

(26,256)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 789.

ELIAS C. BENEDICT, APPELLANT,

vs.

THE CITY OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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a
Original.

United States Circuit Court of Appeals for the Second Circuit.

ELIAS C. BENEDICT, Complainant-Appellant,
against

THE CITY OF NEW YORK, Defendant-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the District Court for the Southern District of New York.

Reed & McCook, Esqs., Solicitors for Complainant-Appellant, 15 William Street, New York City.

Lamar Hardy, Esq., Solicitor for Defendant-Appellee, Municipal Building, New York City.

United States Circuit Court of Appeals, Second Circuit. Filed Dec 22, 1916. William Parkin, Clerk.

1
Bill of Complaint.

Circuit Court of the United States, for the Southern District of New York.

In Equity.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of New York:

Elias C. Benedict, a resident of the Town of Greenwich, County of Fairfield, State of Connecticut, in the District of Connecticut, and a citizen of the State of Connecticut and of the United States, brings this, his bill against The City of New York (hereinafter called the "defendant"), a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said United States and of said State, and a resident of said State and District; and thereupon your orator, on behalf of himself and all

others similarly situated as may choose to join therein and contribute to the expenses of this suit, complains and says as follows:

1st. That your orator is a resident of the Town of Greenwich, County of Fairfield, State of Connecticut, in the District of 2 Connecticut, and a citizen of said District and State and of the United States, and brings this bill of complaint on his own account and on behalf of all others similarly situated as may choose to join therein and contribute to the expenses of this cause, and avers that the other certificate holders herein mentioned are composed of a large class, the names, location and number of which are unknown to your orator.

2nd. That your orator is informed and believes, and therefore avers, that the defendant is a municipal corporation organized and existing under and by virtue of the laws of New York, and has its office and principal place for conducting its business in, and is a citizen and resident of the City, County, Southern District and State of New York.

3rd. Your orator is informed and believes, and therefore avers, that in consideration of, and in payment for, certain services rendered by Messrs. Farwell, Sage & Company, of the City of New York, under a certain contract had by them with the City of Long Island, a municipal corporation, duly organized and then existing under and pursuant to the laws of the State of New York, in and about the opening up of certain streets in said City, as provided for in Chapter 376 of the Laws of 1874 of the State of New York, which said services were rendered for the benefit of the City of Long Island and its residents, and upon the merger of said City with the defendant as hereinafter set forth for the benefit of the defendant; there were prior to June 11, 1879, issued and delivered to said Farwell, Sage & Company, by and on behalf of and for the said City, through its Treasurer and Receiver of Taxes, certain certificates, the same being numbered as in the Schedule thereof marked Exhibit "A," annexed hereto and made a part hereof, amount-

3 ing in the aggregate sum (face value) of \$8,000.00, all of which said certificates bearing date, and being issued, prior to the eleventh day of June, 1879, the date of the enactment of Chapter 501 of the Laws of 1879 of the State of New York, and on or about the date of said certificates; the said certificates being payable with interest at the rate of 7 per cent., as in said certificates therein set forth; that each of said certificates were substantially of the form and tenor as set forth in a copy of one of the same which is annexed hereto marked Exhibit "B" and made a part hereof, except as to the amounts for which they were issued, and the dates thereof.

4th. Your orator avers that thereafter and prior to June 11, 1879, each and every one of said certificates were thereafter for value duly sold, assigned, transferred and set over to your orator who has at all times since then been and still is the lawful owner and holder, and entitled to the payment thereof.

5th. Your orator avers that said Chapter 326 of the Laws of 1874, which was entitled "An Act to provide for Improvements in and

adjacent to the First Ward of Long Island City," and provided for the appointment of Commissioners to perform the duties therein set forth, contained among other things the following provisions (the italics being your orator's) :

(a) In Section "1" thereof, that,

"The powers, duties and terms of office of the Commissioners of streets, roads, avenues and parks in Long Island City, appointed under Chapter Seven hundred and Sixty-five of the laws of the State of New York of eighteen hundred and seventy-one, passed

4 April twenty-sixth, one thousand eight hundred and seventy-

one, entitled "An act to provide for the laying out of streets, avenues, roads and parks in Long Island City, as modified and amended by Chapter Eight Hundred and Fifty-nine of the laws of eighteen hundred and seventy-two, * * * entitled 'An act to amend an act entitled An act to provide for the laying out of streets, avenues, roads, and parks in Long Island City' passed April twenty-sixth, eighteen hundred and seventy-one, are hereby extended for a period of not exceeding five years for the purpose of improving the streets and avenues in the district in and adjoining the First Ward of Long Island City."

In Section 2 thereof:

(b) "Said Commissioners are hereby authorized, empowered and directed to proceed with all possible dispatch to grade, sewer, pave or macadamize, curb, gutter, and flag so much of each street and avenue laid down on the Commissioner's map of said Long Island City, as is embraced within the boundaries aforesaid including all streets and parts of streets laid out over any salt marsh, but excluding Tenth Street from West Avenue to the East River, and also excluding all parts of the Streets, except Front Street, laid out over lands now being below low-water mark on the East River and Newtown Creek; and also to lay crosswalks at all street intersections within the same limits, and to bridge any water necessary to be bridged but no grad-

5 ing, sewer ing, paving, macadamizing, curbing, guttering,

flagging or laying of crosswalks, shall be done on any street or avenue until after the title to that portion thereof so to be improved shall have been acquired by, and vested in, said city for the purposes of a street thereof, but said improvements shall be done on all such streets and avenues and parts of streets and avenues within said district upon such title being acquired thereto respectively."

(c) In Section 3 thereof: "Said Commissioners shall estimate, ascertain and certify to the *Board of Assessors of Long Island City*, the cost, charges and expenses of the grading, sewer ing, paving, macadamizing, curbing, guttering, flagging, bridging and laying of cross walks, in this act provided for, including pay of surveyors, engineers, inspectors, counsel, clerks, and other necessary expenses in and about the making of such improvements with such certainty and particularity as said Commissioners may deem necessary to enable said assessors to make a fair and equitable assessment of the expenses of making the improvements authorized by the act." * * *

"The estimated cost of such grading, paving, macadamizing, curb-

ing, guttering and flagging, shall be assessed as nearly as may be upon the several lots in front of which the same shall be done; the estimated cost of crosswalks and of the paving, grading, curbing, guttering and flagging street and avenue intersections not in front of any lot shall be assessed upon the several lots in adjoining blocks,

6 pro rata, according to the number of lineal feet of street or avenue frontage of such lots respectively; and the proper and equitable proportion of the expense of all sewerage and bridging in the said improvement district, and also the proper and equitable proportion of all the incidental expenses of making the several improvements authorized by this act, shall be assessed upon the several lots, pieces or parcels of land within said improvement district according to the number of lineal feet of street or avenue frontage of such lots, pieces or parcels respectively, and irrespective of buildings thereon, but the area of assessment for the said paving, grading, curbing, guttering and flagging of any street or avenue in said improvement district in front of any lot or parcel of land shall extend to and embrace all the land (exclusive of streets) lying on each side and within one hundred feet of such street or avenue."

(d) Your orator avers that Section 4 of said act provided for the making up and signing by the Assessors of Long Island City of the assessment roll, which was to be filed and deposited in the office of said Commissioners for public inspection; that such Assessors of Long Island City were to meet for the purpose of hearing objections, the said roll to be corrected by said Commissioners of Long Island City after such hearing, if correction was required, and further that after correction the same must be certified by said Assessors of Long Island City to be the final and corrected assessment for all improvements provided for by said act; and that the said roll should be proved or acknowledged by said Assessors of Long Island City and then filed in the office of the Treasurer and Receiver of Taxes of

Long Island City.

7 Section 4 of said act also provided that

"From and after the day of the filing of any such assessment roll in said Receiver's office, such assessment shall be a lien upon each lot, piece or parcel of land within the section or sub-district covered thereby to the extent of the amount assessed on such lot, piece or parcel, together with interest thereon, at and after the rate of 10% per annum; such interest to commence to run three months after the filing of said assessment roll, and shall run until such assessment, with interest thereon as aforesaid, shall be fully paid."

(e) In Section 5 thereof:

"No warrant shall be issued or required for the collection of any assessments under this act; nor shall any warrant be issued for any sale of lands for non-payment of such assessments until ten years after the filing of such assessment roll; but all lots, pieces or parcels of land on which any assessment under this act shall remain unpaid on and after the filing of the assessment roll, affecting the section or sub-district in which the lot is located, shall be advertised and sold for the payment of such unpaid assessment; and such sale or sales

shall be made by the Receiver of Taxes or other officer then charged by law with the duty of selling lands in said city for non-payment of city taxes and the proceedings for such sale, and such sale shall be the same and on the same notice and like terms; and said lots or parcels of land so sold may be redeemed, and in default of 8 such redemption title thereto shall be given and perfected in the same manner, to the same extent and with the same force and effect; and the costs, fees, charges and expenses of such sale shall be the same as shall then be prescribed by law for the sale of lands in said city for non-payment of city taxes, without further action or legislation on the part of the common council or any other body."

Your orator also avers that said Section 5 also provided that if said assessment roll or any assessment therein should be vacated, set aside or modified by any Court or officer and any further order made correcting the same, that, as to such errors and irregularities, a new and corrected assessment roll should be made by said Assessors of Long Island City, conforming with the directions of said order, and that the corrected or new assessment roll should be filed in the office of the said Treasurer of Long Island City, "as of the day the assessment roll so corrected was originally filed therein, and thereafter such corrected assessment or assessments shall be a lien upon the several lots, pieces or parcels of land assessed in the same manner and to the same extent and with the same force and effect as if so made originally."

It was also in said Section 5 provided:

"And it is declared to be the intention of this act that the fullest power of amendment shall be vested in said Commissioners and said Assessors, *so as to promote substantial justice in the matter of said assessments and in enforcing their lien and collection, so that no part of the property benefited by the improvements shall be 9 exempted from paying its fair share of the expenses thereof.*"

(f) In Section 6 thereof:

"Any assessment made under the provisions of this act, may be paid to the *Treasurer and Receiver of Taxes of Long Island City* at any time; and payments in sums of not less than twenty dollars may be made at any time on account thereof or of the accrued interest thereon, but all payments on account shall be first applied to the discharge of the accrued interest, and the residue, if any, of such payments shall be credited on account of the principal sum of said assessments respectively. The improvement certificates hereinafter provided for shall be receivable at all times at par and accrued interest in payment of any assessment under this act, and of the interest accrued thereon. All moneys received by said *Treasurer* in payment of such assessments or interest shall be placed to the credit of the *improvement fund*, consisting of the *amounts* in the hands of the *Treasurer* growing out of payments of said assessments and interest, and shall be kept separate and apart from any other moneys in his hands, *and no part of said fund shall ever be paid out by him*, except for the purchase of such improvement certificates as provided in the Seventh Section of this act, or as is herein otherwise provided. Suitable books of account shall be kept by said

Treasurer showing the date and amount of every payment made to him on each lot, for or on account of the sum assessed or of the accrued interest thereon, and whenever the assessment on any 10 lot shall have been paid in full with interest said Treasurer shall enter on the assessment roll opposite to and on the same line with the entry of the assessment so paid the words 'paid in full,' with the date of such final payment, and from and after such entry such lot shall be free and discharged of and from the lien of such assessment.

(g) Your orator avers that in Section 7 it was provided that whenever the City Treasurer of Long Island City should have not less than \$5,000, on hand to the credit of said improvement fund that he should after giving further notice thereof advertise, as therein provided, for the purchase of said improvement certificates and the sale of certain thereof to him, said certificates when so sold to be cancelled by said Treasurer of Long Island City, and a record thereof kept by said Treasurer of Long Island City.

(h) Your orator further avers that in Section 9 it was provided that, in order to pay the expenses of the improvement work the said Commissioners, should, and were thereby authorized to, issue certificates of indebtedness to be known as "Improvement Certificates in Long Island City" and that—

"Such certificates shall be paid out at par to contractors for payments falling due to them upon contracts for work done or materials furnished, as provided for herein, and the same may be also sold or negotiated at par by said Commissioners, to obtain money for the payment of the incidental expenses necessary in and about the matter of their duties herein, and being all expenses incurred by them other than for labor done and materials furnished under 11 written contracts. Such certificates shall be signed by the commissioners or a majority of them, and countersigned by the Treasurer of Long Island City, on the written requisition of said Commissioners or a majority of them, and shall draw and bear interest at and after the rate of seven per cent. per annum from the date thereof. They shall be receivable at all times at par and accrued interest in payment of any assessment laid under this act and of the accrued interest thereon and shall be payable with interest as aforesaid in the manner hereinabove provided, out of any moneys which shall come into said Treasurer's hands to the credit of said improvement funds."

Your orator also avers that it was in said statute also provided that a record of said certificate should be kept by the said Treasurer of Long Island City, and that no certificates should be valid for any purpose until countersigned by said Treasurer of Long Island City, and that on receiving all or any of said certificates in payment of said assessments or interest, or by purchase, that said Treasurer of Long Island City should cancel the same and make entry thereof on the records kept by him, and that it was also therein provided that,

"The said Commissioners, in making any contracts for the improvements hereinabove provided, shall reserve the right to pay the

contractor or contractors therefore by delivery of the certificates hereinbefore described."

(i) Your orator avers that in Section 10 thereof it was provided that said Commissioners should have power to receive "in behalf of Long Island City" grants of title to any streets or avenues, 12 and that they should have all the same functions, rights and powers in regard to any "streets, avenues or public places within the improvement district hereinabove described as are now granted to the Common Council of Long Island City, by virtue of Chapter Two of Title Three of Chapter Four Hundred and Sixty-one of the Laws of New York, of Eighteen Hundred and Seventy-one, entitled 'An Act to revise the Charter of Long Island City.'"

(j) Your orator avers that in Section 11 it was provided as follows:

"Upon the completion of the sales for the non-payment of the assessments levied, as hereinabove provided, of the lots and parcels of land in said improvement district, after the expiration of ten years from the filing of the assessment rolls, *all the certificates issued by the said Commissioners shall be paid off*, and if there be any excess to the credit of said improvement fund in the hands of the Treasurer, *it shall be paid into the City Treasury, in payment of city taxes upon the property assessed hereunder* within said improvement district, in proportion to the amount assessed upon each lot or parcel of land respectively, and the owner of each lot or parcel of land *shall have credit therefor upon such taxes.*"

(k) Your orator avers that in Section 12 it was provided that the Mayor of Long Island City should have the power to increase the number of said Commissioners as therein set forth; said additional Commissioners to have the same powers and duties as the other Commissioners as if they had been originally designated in the Acts of the Legislature therein specified; it being also therein provided that "upon the occurrence of any vacancy by the death, resignation or disability of any of such Commissioners the remaining Commissioners shall discharge the duties hereby imposed until such vacancy is filled by the Mayor of Long Island City."

(l) Your orator also avers that in Section 13 of said statute it was provided:

"The Treasurer of Long Island City, and his sureties, *shall be liable on his official bonds to Long Island City*, given after the passage of this act imposed by this act for the faithful discharge of the several duties imposed by this Act, and for all moneys which shall come into his hands, under and pursuant to the provisions hereof, and such liability may be enforced in the name of said city for the benefit of whom it may interest or concern, in the same manner and to the same extent and with the same force and effect in all respects as in the case of any city moneys which may come into his hands, or of any duty devolved by law upon said Treasurer."

6th. Your orator further shows that acting under the authority conferred upon them by the said act last mentioned, the said Commissioners did thereupon proceed to do the work which they were

thereby authorized and directed to do and that for the purpose of paying therefor in accordance with the provisions of said act, assessments were levied as therein provided for the aggregate amount of \$1,947,322, and that improvement certificates were also issued as aforesaid to pay for and such were actually used in payment for such work to the aggregate amount of \$1,847,500, and that your orator's certificates were certain of those so issued.

14 Your orator is further informed and believes, and therefore avers, that prior to the issuance of the certificates held by your orator, as aforesaid, the Mayor of said city, under and pursuant to the provisions of said Act of 1874, did, as said Mayor, appoint certain Commissioners in place and stead of certain Commissioners named in said statute, and which said Commissioners so appointed as aforesaid were two of the Commissioners who together with the City Treasurer and Receiver of Taxes, executed, issued and delivered as aforesaid certain of the said certificates now held and owned by your orator.

7th. Your orator avers that said Commissioners, Assessors and City Treasurer and Receiver of Taxes, were local officers and agents of and for Long Island City, in performing all of the matters and things in said Act of 1874 provided for, intended to be and actually employed under said Act of the Legislature in the conduct of local improvements, as appears from the provisions of Chapter 765 of the Laws of 1871 of the State of New York, mentioned in said Act of 1874, which provided among other things, that (Sec. 1) * * * "It shall be lawful for the other Commissioners, as often as such event or vacancy shall happen, to appoint a suitable person to fill such vacancy, and such appointee shall have all the power and authority vested in a Commissioner by this act;" by Section 6, that such Commissioners "shall severally take and subscribe an oath before the Mayor or Recorder of Long Island City * * * and shall report from time to time, when called upon to do so by the Common Council their acts and doings in the premises." By Section 7, that "The Mayor and Common Council of Long Island City shall provide, by special tax or otherwise, such sum or sums of

10 money, as in their judgment shall be necessary to defray the expenses * * * but no such draft shall be paid till a true account of such expenses, in detail, shall have been first rendered to the Mayor and Common Council of said city, verified by the oaths of said Commissioners, and passed upon and approved by the said Mayor and Common Council * * *"; by Section 12, that "the Commissioners appointed under this act, shall keep a record of their acts and proceedings, which record shall be filed on the completion of their terms of office, in the Clerk's office in said city"; by Section 14, that "The said Commissioners shall each receive the sum of three thousand dollars a year, and at that rate while they shall, respectively, be actually employed in the duties assigned to them, the same to be paid by the Mayor and Common Council of Long Island City, out of the moneys provided for the expenses of such commission."

8th. Your orator avers, that in and by the provisions of Chapter

656 of the Laws of 1886 of the State of New York, entitled, "An Act in relation to Unpaid Taxes, Assessments, Water Rates and Rents of Long Island City, and to collect the same, and to insure a more efficient collection of the same in the future," it was provided among other things, as follows (the italicising being your orator's) :

(a) In Section 1 thereof:

"That the Treasurer and Receiver of Taxes of Long Island City shall enforce the collection of all taxes and assessments, water rates and rents,"

and other taxes therein specified,

16 "by the sale of the real estate upon which such tax, assessments, water rates and rents are imposed, in the manner provided by this act; *except that any sale of lands for an assessment heretofore levied for a local improvement shall be separate from sales for taxes and water rates and rents, and shall be at such times as are provided by the acts under the authority of which such assessments were levied.*"

(b) In Section 3 thereof that:

"Said treasurer shall cause to be published at least once a week, for six weeks, in two newspapers of said city, one of which at least shall be an official newspaper of said city, if there be one, a general notice that the several parcels of real estate upon which there are taxes or assessments, or water rates or rents for which a sale is to be had will, at a day specified in said notice, which shall be at the expiration of said six weeks, be sold at public auction *for the lowest term of years for which any purchaser will take the same and pay the aggregate amount due thereon or if no person shall so offer to purchase then in fee-simple, to the highest bidder, at the City Hall in mid city, to pay the taxes or assessments, water rates and rents, interest, percentages and expenses thereon, which remains unpaid at the time of such sale;* such notice shall also state the year or years for which such sales will be made, and that a list of such real estate is open for inspection at said treasurer's office, and shall also state that pamphlets containing particulars of the property to be sold may be obtained at said treasurer's office during office hours; which 17 said pamphlets shall be furnished to applicants therefor free of all costs or charge, and it shall be unnecessary to publish in any other manner a list or statement of said taxes and real estate."

(c) In Section 4 thereof that:

"On the day named in the notice the said Treasurer or his representative shall commence the sale of the said several parcels of real estate at auction for the lowest terms of years for which any purchaser will take the same and *pay the aggregate amount due thereon, and if no person shall so offer to purchase such property for a term of years, said Treasurer or his representative shall sell such parcel in fee simple to the highest bidder, and shall continue such sale*

from day to day until the whole thereof shall have been offered for sale or the sale duly adjourned, as hereinafter provided; but the owner of any piece or parcel of land may discharge the same before the actual sale thereof, by paying the tax or taxes or assessments and water rates and rents, and county and State taxes, for which it is to be sold, *with all accrued interest*, percentage and expenses. Said Treasurer shall bid in in the name of the city and for the use of the proper fund or account all parcels of real estate at such sale and to be sold for unpaid taxes, assessments, water rates and rents which shall not be sold to any other person."

(d) In Section 6 thereof that:

"If the real estate shall sell for more than the amount of the tax or taxes or assessments, water rates or rents, interest, percentages and expenses aforesaid, the surplus shall be paid over by the said Treasurer to the County Court of Queens County, by delivering the same to the Clerk thereof, and upon application of any person interested, such Court shall ascertain and determine, as in the case of surplus moneys in foreclosure, who is entitled to such money, and if it shall appear that such surplus proceedings are valid and regular, order and decree its distribution and payment to the person or persons entitled thereto."

(e) In Section 7 thereof that:

"The purchasers at such sale shall *pay* ten per centum of the amounts of their respective bids to the said Treasurer at the time of sale, and the balance thereof within ten days after the sale, and thereupon the said Treasurer shall execute to each purchaser a certificate which shall contain a description as hereinafter provided, of the real estate purchased, the *amount* paid therefor, the date of sale, and that the same was sold for unpaid taxes or assessments, or water rates or rents, or State and county taxes, as the case may be."

(f) In Section 9 thereof that:

"If such real estate, or any part thereof, be not redeemed as herein provided, the said Treasurer shall execute to the purchaser, including said city or the heirs, successors or assigns of such purchaser, a lease, or if sold in fee, a conveyance of the real estate so sold, which conveyance shall vest in the grantee an absolute estate in fee, and the lien or liens for which the same shall have been so sold shall thereupon be cancelled. Such leases and conveyances shall be executed and acknowledged by said Treasurer in the form required in conveyances of real estate to authorize the recording thereof. * * *

The Common Council of said city may at any time by resolution direct a sale of any lot or lots acquired by said city under the provisions of this act, at a price not less than that fixed by them in that resolution, and said Treasurer shall thereupon advertise said lot or lots once a week for three weeks in all official newspapers of said city, if there be any, and if not, then in any two newspapers published in said city, and shall sell the same on the day of sale, or on

any adjourned day thereafter, to the highest bidder, but at not less than the price fixed by the Common Council."

9th. Your orator is informed and believes, and therefore avers, that at the time said certificates were issued to and acquired by your orator's assignor, and by your orator, as aforesaid, under said Chapter 326 of the Laws of 1874, there were no provisions in said Act, or any provisions of law, or in the said certificates so issued and acquired by your orator and his assignor, as aforesaid, giving, nor did the said assignor, or your orator, or, upon information and belief, any other person ever agree, except purchasers at the tax sales, that the City of Long Island, or its Treasurer or Receiver of Taxes, or any other person whatsoever, or any official or officer thereof, should have the right or power to sell any of the lands or premises described in said Chapter 326 of the Laws of 1874, against which,

and the assessments on accounts of which, the said certificates
20 were acquired by your orator and his assignor, as aforesaid,

at any tax or assessment sale whatsoever for less than the full amount of the assessments with interest thereon; or that any land or premises so sold should, or could, be sold to, or paid for, by any person whatsoever, except in lawful money of the United States such as at the time of such sale might constitute currency of the country; and neither your orator nor said assignor, nor, upon information and belief, any other person except said tax sale purchasers, at any time consented that any part thereof should be sold at any such sale, or paid for by the purchaser thereof in the certificates provided for in and by said Chapter 326 of the Laws of 1874 to be issued, or in any other medium than that ordinarily and generally used as currency, that is lawful money of the United States.

Your orator is further informed and believes, and therefore avers that if such right had existed that then no security at all was furnished to contractors performing said improvement work who were obligated to receive and did receive said certificates in payment therefor, or to their assignees or other certificate holders, in view of the fact that the former owners of lands sold for the non-payment of assessments were given the right under the said Act of 1874 to redeem said land so sold, for the amount of the purchase price, and in doing so to use said assessment certificates.

10. Your orator further shows that at the time the improvement certificates were issued as aforesaid and at the time they were received by him as aforesaid, it was not permitted upon sales of land for non-payment of taxes or assessments in Long Island City to sell the same

21 for less than the amount of the tax or assessment for which the sale was made, and then only to the person who would

pay the tax or assessment and the interest accrued thereon and take the property for the least number of years in consideration of such payment, it being provided in and by the provisions of Section 23 of Title 6th, Chapter 8th of Chapter 461 of the Laws of the State of New York of 1871, which was "An Act to Revise the Charter of Long Island City," passed April 13th, 1871, and in force at all times thereafter, until and subsequent to June 11, 1879, that is sub-

sequent to the time your orator's certificates were acquired by him, that all sales made by the City Treasurer and Receiver of Taxes of said City for nonpayment of taxes should be made "for the shortest period of which any purchaser will take the premises and pay the taxes, assessments, interest, percentage and expenses," in other words, that under the provisions of said statute it was the law at the time of the passage of said Act of 1874, under which said certificates were issued, that *no sales should be made for the nonpayment of assessments or taxes, except for the full amount of the taxes or assessments, interest, percentage and expenses thereon.*

Your orator further avers that said laws of 1874 provided that if at such tax or assessment sale no sale should be made for the land offered for sale, the same should be struck off to the said City of Long Island and that thereupon the said city should receive "in its corporate name" a certificate of sale and should be vested with the same rights as any other purchaser; by reason of which it became the duty of said City through its Commissioners or other agents to see that the lands so sold were not sold for less than the amount of the assessment thereon with interest, percentage and expenses.

22 Your orator further avers that by law and well established custom, such sales were never, prior to June 11, 1879, made for less than the amount of said assessment with interest, the City pursuant to its legal obligations so to do, causing such lands to be bid up to such an amount and never allowing or permitting lands at such sales to be sold for less than said amount, all of which was well known to said City, and its officials, the public at large and your orator and his assignor.

That by said Chapter 656 of the Laws of 1886, it was provided as aforesaid, that the Treasurer of said city should first offer the property subject to the taxes and assessments for the non-payment of which it was to be sold, for sale at auction for the lowest term of years for which any purchaser would take the same and pay the aggregate amount due thereon, and if no person should then offer to purchase such property for a term of years, the said Treasurer or his representative should sell such parcel in fee simple to the highest bidder.

Your orator therefore alleges that the said Act of 1886, insofar as it purported to give to the officials of said City the right and power, at said tax sales, to make sales of lands for less than the amount thereof with interest; that is, the power to sell said lands for any amount they saw fit, and to cut off and destroy the lien of certificate holders without the creation of any fund for the payment of said certificates, which right so to do did not exist at the time of the issuance of said certificates as aforesaid, was unconstitutional, null and void as regards any certificates issued under said Act of 1874 prior thereto, for in so far as the result was as aforesaid it impaired the obligation of the contract thereof, and deprived the 23 owner and holder of his property without due process of law, as in Paragraph 14th hereafter set forth.

Your orator also respectfully alleges that if said Act of 1886 was constitutional as far as the right of holders of certificates issued under

said Act of 1874 are concerned, it was still the duty of said City thereunder, through its Common Council or other agents, to see to it that no sale of any lands should be made for non-payment of assessments thereon for less than the full amount thereof, with interest, and to be represented at said sales for said purpose, and to bid in and purchase said lands at said sales, thereafter disposing of them for such (if necessary to effectuate said purpose) an amount as would be sufficient to pay the assessment thereon, with interest.

11th. Your orator is informed and believes, and therefore avers, that as in and by the terms and provisions of Section 4 of said Chapter 326 of the Laws of 1874, under which your orator's certificates were issued, it was provided that the assessments made should

"be a lien upon each lot, piece or parcel of land within the section or sub-district covered thereby to the extent of the amount assessed on such lot, piece or parcel, together with interest thereon"

and should run

"until such assssment, with interest thereon as aforesaid, shall be fully paid,"

and in Section 6, that

"Whenever the assessment on any lot shall be paid in full, with interest, said Treasurer shall enter upon the assessment roll * * * the words 'paid in full,' with the date of such subsequent payment and from and after such entry such lot shall be free and discharged of and from the lien of such assessment."

And in Section 9, that said assessment certificates,

"shall be payable with interest as aforesaid in the manner hereinabove provided out of any moneys which shall come into said Treasurer's hands to the credit of such improvement fund,"

and the other provisions thereof; it became and was the duty of (a) of said City of Long Island City through its City Treasurer and Receiver of Taxes, upon the non-payment of said assessments provided for by said Chapter 326 of the Laws of 1874, to sell the lands covered thereby (but in no event to sell or allow to be sold said lands for less than the amount of the assessment thereon, with interest), and to receive payment therefor in currency of the land; that is money, but not in any depreciated currency or in said certificates issued under said act; (b) of said City of Long Island, through its City Treasurer and Receiver of Taxes, whenever the sum assessed on any lot, with interest thereon, "shall have been paid in full," with interest thereon, *but not otherwise*, to enter upon the assessment roll "paid in full" after which, *but not otherwise*, the said lot should be freed and discharged of and from the lien of said assessment; (c) of said City of Long Island, through its City Treasurer and Receiver of Taxes, not only to refrain from taking any steps whatsoever, to perform or allow to be performed, any acts which would result in said lien being canceled before the full amount of

25 the assessment thereon, with interest, had been paid in full in money, but to take all steps and acts necessary looking to the preservation of said lien until the full amount of the assessment, with interest thereon, had been paid in currency of the country, that is, money, and received by it and deposited in the fund provided for by said act for the payment of said certificates; and to be represented at all tax sales thereunder so as to prevent the lands sold from being sold *for less than the full amount of the assessment with interest*; and to take and have taken legal proceedings against the City Treasurer and Receiver of Taxes and the sureties on his bond to enforce and protect the rights of said certificate holders.

12th. Your orator is informed and believes, and therefore avers, that on or about the 11th day of June, 1879, the Legislature of the State of New York passed a certain act at a session thereof, known as Chapter 501 of the Laws of 1879, entitled "An Act to prepare for and aid in closing up the business of the Improvement Commissioners of Long Island City," which said Act in terms provided in part in substance as follows (the underscoring is your orator's):

(a) In Section 1, thereof, that: it should be lawful for the Commissioners appointed under said Chapter 326 of the Laws of 1874, to exempt any street or avenue, or any part thereof within the improvement district constituted and established by said act, from the operation thereof, insofar as certain improvements were concerned, provided such Commissioners should deem it expedient to do so, said Commissioners to make and file in the office of the Treasurer and Receiver of Taxes of Long Island City a certificate specifying the streets and avenues or parts exempt, and also specifying 26 the amounts assessed upon each particular lot, piece or parcel of land so exempt; but that

"no such certificate on exemption shall in any way or to any extent affect or impair the lien or validity of any assessment made under said act, upon any lot, piece or parcel of land in any such certificate mentioned, nor shall it affect or impair any right or remedy for the enforcement or collection thereof unless payment in full of the residue of such assessment with interest, shall be made, prior to the final maturity of such assessment, as in said act provided."

(b) In Section 3, thereof that: any assessment levied upon any lot under the provisions of either of said Acts might "be apportioned by the Assessors of Long Island City" as they deemed just and equitable, and that a memorandum thereof should be made on the books of the Treasurer of Long Island City, and that

"the amount so apportioned or allotted to each part of such lot shall thereafter be a lien thereon, and may be paid and such part discharged therefrom, and the collection thereof may be enforced in the same manner and to the same extent, and with the same force and effect, as though such assessment had been originally levied and assessed as so apportioned."

(c) In Section 4, thereof that: it should be lawful for said Com-

missioners to make such equitable provision or allowance for the clerical and other work required in the office of the Treasurer of Long Island City, and in connection with the levying, apportionment and collection of said assessments, and such equitable provision or allowance "to the Assessors of said City," for completing the assessments as said Commissioners should deem advisable.

(d) Section 6 thereof provided that:

"Each assessment levied after the passage of this act shall have but eight years to run instead of the ten years prescribed by said act."

(e) In Section 10 thereof it was provided that:

"At the sale of any lot, piece or parcel of land for non-payment of assessments or interest thereon, as provided for by Section Five of said act, it shall be the duty of the officer making such sale to receive the improvement certificates authorized by the act aforesaid at par and accrued interest, in payment of the assessments and accrued interest for which such sales shall be made, exclusive of the costs of sale, in the same manner, to the same extent, and with the same force and effect, and such certificate when received by him shall be permanently and effectually canceled and defaced by, and deposited with the same officer, and a like account shall be kept thereof as now provided by law for the receipt, cancellation, and defacement of such improvement certificates when received in payment of such assessments and accrued interest."

(f) Section 11 provided that such act should take effect immediately.

13th. Your orator is also informed and believes, and therefore avers, that this defendant claims that under and pursuant to the provisions of said Chapter 501 of the Laws of 1879, more especially Section 10 thereof, the Treasurer and Receiver of Taxes of Long Island City, in conducting the tax sales under Chapter 655 of the Laws of 1886, which law was in existence at the time the premises referred to in Chapter 326 of the Laws of 1874, were sold for non-payment of assessments, had the right, and it was his duty upon such sale, to sell said lands, if the full amount of the assessment with interest should not be paid by the owner of said land, to the highest bidder therefor, irrespective of whether or not the amount of his bid equalled the said assessment, with interest, and also to allow said purchaser to pay for the same in a medium other than cash, to wit, in the said assessment certificates, irrespective of whether or not they were worth in the market their face value.

14th. Your orator is informed and believes, and therefore avers, that in so far as the said Act of the Legislature of the State of New York, known as Chapter 501 of the Laws of 1879 attempted to provide that upon the sale of any lot, piece or parcel of land for non-payment of assessment or interest thereon, as provided for by Section 5, of said Act of 1874, under which said certificates were issued as aforesaid, that it should thereupon be the duty of the officer making such sale to receive improvement certificates issued under said act, at par and accrued interest in payment of the assessments and accrued interest for which such sale should be made, thus making

impossible the creation of any fund out of which the outstanding certificates could be paid, the said act of the Legislature of the State of New York was, as regards each and every certificate issued prior to the passage of said act, unconstitutional and in violation of, and in conflict with the provisions of Article 1, Section 10,

29 Clause 1, of the Constitution of the United States of America providing that no State shall pass any law impairing the obligations of contracts; and with Section 1 of the Fourteenth Amendment to said Constitution prohibiting any State from making or enforcing any law depriving any person of life, liberty or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the law; and the said statute was therefore absolutely and totally null and void for the reason that said act impaired the obligations of the contract with

your orator's assignor, the said Farwell, Sage & Company, under which said certificates were issued, and with your orator, and deprived each of them of his and their property without due process of law, through its attempting to provide for the payment of said assessments and interest thereon, out of which said certificates were payable as aforesaid, in other than lawful money of the United States, that is, in a medium generally thought to be depreciated and worthless, to wit, the said certificates which since their issue, and at the time of the passage of said act, and at the time of the sales hereinafter set forth, were generally thought to be and were worth much less than their face value; that is, when issued were worth not less than 95% of their face value, but at the first sale hereinafter mentioned were not worth more than 65% of their par value, and at the second sale not more than 33 1/3% thereof.

15th. Your orator is informed and believes, and therefore avers, that at the time his assignor and your orator acquired the said certificates aforesaid it was, in view of the law under which said certificates were issued, and the laws and custom governing in said City, as hereinafter set forth, the understanding of both and their 30 belief, and also the understanding of said Commissioners, assessors, Treasurer and Receiver of Taxes, and other officials of Long Island City, and of the City itself, as well as of the financial public at large, and contractors who did the improvement work for the City, and it was so as a matter of law, that the assessments upon the said lands and premises, as well as the moneys provided to be received in payment thereof, constituted a trust fund for the payment of the certificates issued, and that the holders and owners of the certificates had a lien upon said trust fund and a beneficial interest in said lien, and that no one of said assessments could be cancelled or the lien thereof discharged, unless, and until, the full amount of the assessment, with interest thereon, as provided in said Act of 1874, should be paid in money, and that nothing whatsoever should or could be done by any of the officials mentioned in said Act, or said City, or any one else, which would result in the cancelling of said lien without the full amount of the assessment, with interest, being paid for in money; and that at any sale of lands for non-payment of assessments, the same should be paid for in money,

and not in said certificates, and that no sale should be made or allowed to be made for less than the amount of said assessments, with interest thereon, from the date of such sale; that the said City of Long Island was, through its said City Treasurer and Receiver of Taxes the Trustee of said lien created by said assessments as aforesaid, and of all moneys provided to be received in payment of said assessments, for the benefit of the outstanding certificate holders, it having no beneficial interest therein whatsoever, and that it was its duty through its said officers and agents to see that the
 31 said lien was preserved intact and not cancelled until the amount of the assessments were paid in full.

Therefore, when said City, through its said officer or agent, sold as hereafter set forth the parcels of land on which the assessments had not been paid, and executed to the purchasers thereof certificates of sale, as it did as hereinafter set forth, and the said purchasers thereupon, acquired, as they did, the lien which the said City held in trust for said certificate holders aforesaid, and became the assignees thereof, with inchoate rights therein and thereto, which said rights thereafter became consummated through the execution by the officers and agents of said city and of its successor the defendant herein, as elsewhere herein set forth, of deeds of sale; by reason of and through the execution of which said certificates of sale and said deeds of sale, and the other wrongful, improper, unlawful and negligent acts of said City, and its agents as aforesaid, the lien of said assessments became cancelled and nullified, and the outstanding certificate holders deprived of and from all rights they theretofore had for the redemption and payment of their outstanding certificates; the said City committed a breach of its continuing trust duties to all outstanding certificate holders to see that the fund, wherewith to pay said certificates, was created and kept intact until the same were all paid, for which breach of duty this defendant is liable as herein set forth.

Your orator respectfully states that such was in effect held to be the law by the Court of Appeals of New York, in *People ex rel. Oakley v. Bleckwenn*, decided in April, 1891, supra, it being said by Mr. Justice Gray (p. 316), as follows:

"Now, the assessment liens, to discharge which these certificates were available, continued such after a sale and until that sale was consummated by the deed or lease of the municipality."

and also

"The sale is merely a mode of enforcement of the payment of the assessment. The purchaser at a tax sale has only acquired the lien of the municipality. He is the assignee, in effect, of the assessment lien, is thus protected as to this payment, until his inchoate rights are consummated by the execution of his deed or lease."

16th. Your orator is further informed and believes, and therefore avers, that any owner of land sold as aforesaid, for non-payment as aforesaid, had the right at any time within the statutory period to

redeem the same by paying the purchase price therefor; that is to say, as provided in Chapter 461 of the Laws of 1871, heretofore referred to in Paragraph "10th," the full amount of the assessment thereon, and upon doing so have the lien thereon cancelled, and that he had a right in so doing to use said assessment certificates in making said redemption.

Your orator is further informed and believes, and therefore avers that upon so redeeming with certificates it was customary for the said city through its City Treasurer and Receiver of Taxes to cause the lien of the purchaser under said assessment sale to be satisfied and that it did in each case satisfy such lien by transferring to said purchaser the certificates tendered for the redemption of the land by the legal owner thereof, in violation of the provisions of Section 6 of Chapter 326 of the Laws of 1874, which among other things provided that any moneys or certificates so received by said

33 Treasurer and Receiver of Taxes should never be paid out by him, except as therein set forth, it being the intention of said Act that certificates used upon said redemption should be retired and cancelled as of record, all of which was for the purpose of preserving intact said special assessment fund that the rights of holders of other certificates still outstanding might be preserved and that the fund might not be diminished before the retirement of such other outstanding certificates.

Your orator is further informed and believes and therefore avers, that the amount of the face value of said certificates which have been retired and cancelled as provided by said Act of 1874 is not more than two-thirds of the total face value of all the certificates originally so issued, thus leaving now outstanding and totally unprovided for by the special fund required to be raised by said Act of 1874 an amount of certificates equal to not less than one-third of the face value of all the certificates originally so issued, by reason of which facts said certificates to the amount of one-third their face value have been made by said Long Island City, through its Treasurer and Receiver of Taxes, and now are of no commercial or marketable value whatsoever. That as a result of the foregoing the security which the other certificate holders under the said statute of 1874, including the contractors who had done improvement work under contracts with the said city, became seriously prejudiced, and the rights of bona fide purchasers under said assessment sales, who had paid therefor in legal tender money to the full amount of the assessment, with interest, and not in a depreciated medium, and were thereafter compelled to receive, in place of money thus paid, depreciated certificates from said owner as a medium of redemption, were unlawfully violated.

34 17th. That your orator has been at all times since said certificates were acquired by him as aforesaid, the legal owner and holder, and entitled to enforce payment, thereof in the manner and form provided in said certificates, and in said Chapter 326 of the Laws of 1874, and has been and your orator still is entitled to all of the benefits and provisions thereof and therein; but that none of said certificates or any of them, or any part thereof, has been paid

by said "City" or by the defendant herein, or by any person or agent of or for said "City" or defendant, to your orator, or his assignor, or to any person for or on his or their behalf; and that said fund to be established by said city through its officers or agents under said Chapter 326 of the Laws of 1874, upon the sale of said lands for nonpayment of assessments has never been established either in whole or in part in violation of the continuing duty so to do, for the reason that said City of Long Island through its Treasurer and Receiver of Taxes, wrongfully and unlawfully, and in violation of law and of the rights of your orator and of said assignor, and of other certificate holders, sold as hereinafter set forth and allowed said parcels of land to be sold for less than the amount of said assessments, with interest, and received and allowed to be received in payment therefor said certificates, and thereupon cancelled and allowed to be cancelled the liens thereon, all of which was done against, and in opposition to, the protest of divers certificate holders; and that said city and its officers and agents totally failed to take any steps whatsoever, as it and they were in duty bound to do, looking towards the enforcement and protection of the rights of said certificate holders, for whom said City was Trustee as aforesaid, as herein set forth; that the entire amount of said certificates of your orator, with interest thereon remains due

35 and payable as in such certificates and said Chapter 326 of the Laws of 1874, provided.

18th. Your orator is informed and believes, and therefore avers, that in the years 1888 and 1889, the said City of Long Island through its City Treasurer and Receiver of Taxes conducted a public sale of said lands upon which said assessments, with interest, had not been paid, for non-payment of said assessments and interest (at which sales the lands were generally sold for the full amount of the assessment thereon with accrued interest, and sometimes in excess thereof), and did, at said sale, against the protests and over the objections of divers certificate holders situated similarly to your orator, contrary to its duties as such Trustee as aforesaid, sell a large number of parcels of land, receiving in payment therefor from the purchaser thereof some of the outstanding certificates which at the time of said sale were generally thought to be and were worth less than their face value, to wit, about 65 per cent. thereof.

That thereafter and in the year 1892 beginning about the sixteenth day of March in said year, and at divers days thereafter, to and including the 2nd day of November of said year, the said City, through its said City Treasurer and Receiver of Taxes, did sell a large number of other parcels of said lands upon which assessments with interest had not been paid, for non-payment of said assessments and interest, to divers persons over the protests and objections of divers outstanding certificate holders situated similarly to your orator, and did sell said lands over said protests and obligations contrary to its duties as Trustee as aforesaid for less than the amount of the assessment, with interest, and did receive in payment therefor from said purchasers outstanding certificates, which said certificates were at the time of said sale generally

thought to be and were worth less than their face value, that is, were not worth more than 33 1/3 per cent. thereof; and as your orator is further informed and believes, and therefore avers, neither the said City nor its said Treasurer and Receiver of Texas, or any other officers or agents of said City received at *said sales* any money whatsoever as the purchase price of said lands so sold.

And your orator further shows as an illustration of the method at said sales, that — the second sale above mentioned a protest was made against the said City, or its agents representing it at said sale, receiving at the sale anything but legal tender money of the United States, unless the property brought the full amount due upon the assessment for which it was sold, and the person making the protest when the third lot of property was put up for sale upon which there was then due the sum of \$1,560.25 for principal and interest of the assessment levied thereon as aforesaid bid therefor \$300 in legal tender money of the United States for such lot and at the same time offered to sell improvement certificates to anyone who would buy the same at thirty cents on the dollar, he having such certificates at hand ready to deliver, but that the City Treasurer thereupon accepted a bid for \$400 in improvement certificates from another party as being a higher bid, and thereupon knocked the said lot down in fee to the said certificate bidder who bid \$400 in certificates, mentioning that fact at the time of making his bid as being the highest bidder and accepted such certificates in payment of said bid; and he furthermore announced at the time of

37 such sale that the property might be redeemed therefrom in improvement certificates.

And your orator is informed and believes, and therefore avers that as a matter of fact at said sales had in the year 1892 the amount of said unpaid assessments, including interest thereon, for which said sales were had, amounted at the time of such sales to upwards of \$1,760,000; that upon the sales had in said year none of the parcels of land brought the full amount assessed against them, although at said sales had prior to the year 1892 all sales of lands were for the full amount of the assessment thereon, with interest, but on the contrary the said lands so sold in 1892 were sold in fee and in almost every case in one bid and at various prices ranging from less than 2 per cent. of the amount of the assessment to a general average of about 40 per cent. The result of said sales so made was that the total amounts realized therefrom were insufficient to satisfy said outstanding certificates, and as such certificates were received upon the sale and all payments were made therein there now remains outstanding a large amount of said certificates amounting to, as your orator is informed and believes, not less than \$300,000 on the face thereof, exclusive of interest, of which there are now owned and held by your orator certificates to the aggregate amount of \$8,000, exclusive of interest, all of which were received by him as above set forth and have been ever since then and still are owned by him.

And your orator further shows as he is informed and believes that neither the said Frederick W. Bleckwenn, the then City Treasurer and Receiver of Taxes, at any of the times aforesaid, nor his bonds-

men were or are of sufficient pecuniary responsibility to re-
38 spend to such claims as may be made against him or them for his actions in the premises.

And your orator further shows that much of the property sold at such tax sales as aforesaid was at the time of the respective sales, and is now worth very much more than the amount for which it was sold; and that by reason of said redemptions allowed through the use of said Improvement Certificates, and still being allowed by this defendant, without any payments whatsoever being made in legal tender money, your orator has had left on his hands the said certificates received by him, which now have but little market value, in view of the fact that the fund out of which they were to be paid has never been established, in violation of the continuing trust duties owing by said City to your orator, as aforesaid.

19th. Your orator is further informed and believes, and therefore avers, that after said sales so made as aforesaid the said City, as well as this defendant, its successor, did execute through its officers and agents, or caused or allowed to be executed, to said purchasers, certificates of sale of the lands sold at said sales, and thereafter executed or caused to be executed conveyances in fee of said premises, by reason of which said doings in connection with the cancellation as aforesaid of the lien of said assessments, the lien of the outstanding certificate holders which was held by the said City and this defendant in trust for the said certificate holders, was cancelled and said certificate holders were deprived of any and all means of payment thereof.

Your orator is informed and believes, and therefore avers, that at the time of the execution of said assessment certificates, and for some

39 time before as well as down to and subsequent to the said sales as herein set forth, the said Frederick Bleckwenn, and John R. Morris, Francis Tiernan and John F. Tiernan, his predecessors in office, were the said City Treasurer and Receiver of Taxes of Long Island City during the time each was in office, and that said Bleckwenn as such, and for said City, had charge of the tax sales, conducted said sales and issued certificates of sale and deeds of conveyance of lands sold thereunder; and that said John R. Morris, Francis Tiernan and John F. Tiernan, as such City Treasurer and Receiver of Taxes did, during the time they were in office, representing said City, as provided in said act, countersign the certificates of indebtedness belonging to your orator as aforesaid.

20th. Your orator further alleges that all of said acts done by the said City Treasurer and Receiver of Taxes, and by said assessors and by said Commissioners, were done by them as officers and agents of the said City.

21st. Your orator is informed and believes, and therefore avers, that in and by Chapter 466 of the Laws of 1901, of the State of New York, which was entitled "An Act to amend the Greater New York Charter, Chapter Three Hundred and Seventy-eight of the Laws of Eighteen hundred and ninety-seven, entitled 'An act to unite into one municipality under the corporate name of The City of New York, the various communities lying in and about New York Harbor, including the City and County of New York, the City of

Brooklyn and the County of Kings, the County of Richmond and part of the County of Queens, and to provide for the government thereof,' the said City of Long Island and each and every part thereof, including all the premises described in said Chapter 326

of the Laws of 1874, were annexed to and united and consolidated with the municipal corporation known as the Mayor,

40 Aldermen and Commonalty of the City of New York, and thereafter called "The City of New York," it being therein provided that the boundaries, jurisdiction and powers of the said City of New York therein constituted should be for all purposes of local administration and government co-extensive, and it was thereby declared to be the successor corporation in law and in fact of all the municipal and public corporations united and consolidated with it, with all their rights and powers and "subject to all their lawful obligations without diminution or enlargement," except as therein specially provided; it being also provided in Section 4 as follows:

"All valid and lawful charges and liabilities now existing against any of the municipal or public corporations or parts thereof, which by this act are made part of the corporation of the City of New York, including the County of Kings, and the County of Richmond, or which may hereafter arise or accrue against such municipal and public corporations, or parts thereof, including the said Counties of Kings and of Richmond, which but for this act would be valid and lawful charges or liabilities against the same, shall be deemed and taken to be like charges against or liabilities of the said the City of New York, and shall accordingly be defrayed and answered unto by it to the same extent, and no further, than the said several constituent corporations would have been found if this act had not been passed. All bonds, stocks, contracts and obligations of the said municipal and Public corporations, including the County of Kings and the

41 County of Richmond, and such proportion of the debt of the county of Queens as hereinafter prescribed which now exist as legal obligations, shall be deemed like obligations of the City of New York, and all such obligations as are authorized or required to be hereafter issued or entered into, shall be issued or entered into by and in the name of the corporation of the City of New York."

That it was also in Section 5 of said act provided as follows:

"All laws, or parts of laws, heretofore passed creating any debt or debts of the municipal and public corporations united and consolidated as aforesaid, or for the payment of such debts, or respecting the same, as well as every such law respecting the debts of the corporation known as the Mayor, Alderman and Commonalty of the City of New York, shall remain in full force and effect, except that the same shall be carried out by the corporation hereby constituted, to wit: 'The City of New York,' and under such name and in such form and manner as may be suitable to the administration of said corporation; and all the pledges, taxes, assessments, sinking funds, and other revenues and securities provided by law for the payment of

the debts of the municipal and public corporations aforesaid, shall be in good faith enforced, maintained and carried out by the corporation of the City of New York. All the valid debts of the municipal and public corporations mentioned in the First Section of this act, including the County of Kings and the County of Richmond and the proportion of the debt of the County of Queens
42 and of the Town of Hempstead aforesaid, and the valid debts of the towns incorporated villages and school districts herein united and consolidated with the corporation heretofore known as the Mayor, Alderman and Commonalty of the City of New York, into the City of New York, as well as the debts of the latter corporation, shall be the common debt of the City of New York. So far as resort to taxation shall extend equally throughout the territory of the corporation herein constituted, except that all assessments for benefits, hereinbefore laid or provided to be laid for the payment of any portion of such debts, or to reimburse any of the said municipal and public corporations which created such debt, in respect thereof, shall be preserved and enforced, it being the intent hereof that the obligations and liability of the City of New York, as the successor of municipalities and public corporations consolidated into it, shall be the same as, and not otherwise greater than, the respective obligations and liabilities of the several constituent corporations, and that the City of New York shall succeed to all of their rights as well as to their obligations and liabilities in respect thereof, except as herein otherwise specially provided."

21st. Your orator is further informed and believes, and therefore avers, that this defendant is still allowing redemption to be made by the former owners of land for non-payment of assessments as aforesaid, of said lands, and has as late as September 23, 1907, allowed and still is allowing such redemption, the said defendant allowing

43 said former owners to redeem upon delivery to said defendant of certificates at their par value, but not at their market value,

the market value being much less than the par value, and much less than the amount of said assessments with interest, which said certificates are thereafter being delivered by this defendant to the purchasers at said sales by reason of which the former owners are receiving reconveyances of said lands, theretofore sold, free and clear from the lien of said assessments, without said owner paying the amount of said assessments, with interest, but paying much less, to wit, the market value of said certificates which he had purchased, which market value was much less than the amount of said assessments.

And your orator further shows that said City, claims said right so to do under the said Act of 1886, whereas the said act, as well as said Chapter 461 of the Laws of 1871, to which reference is respectfully made, both require such redemption to be made in legal tender money of the United States.

23rd. Your orator is further informed and believes, and therefore avers, that under and pursuant to Chapter 461 of the Laws of 1871 of the State of New York, as amended by Chapter 454 of the Laws of 1879, the said City of Long Island City had, from the time of the

passage of the former act and until after the sales herein referred to were made a department thereof known as the "Finance Department and Receiving of Taxes," the chief officer of which department was, as in said act provided, known as the City Treasurer and Receiver of Taxes, who was as therein provided elected by the citizens at large of said City, and had, as therein set forth, "charge of all the local fiscal concerns of the corporations, assessments, water and other rates, and of the appropriations made for carrying on the business of the corporation," and was, as therein also provided, "the custodian of all the City funds," receiving for said services the salary of \$2,000 per year, which said salary, was, as in said former act provided in Title Sixth thereof, raised by the Common Council of said City by a general tax.

24th. Your orator avers that he and other owners of certificates similarly situated have for many years last passed, that is, ever since the issuance of said certificates to the assignor of your orator, as aforesaid, used due and diligent efforts to obtain payment of said certificates from said City, and from this defendant, and to obtain relief from them on account of the wrongful and improper acts and breaches of trust committed and still being committed and perpetrated by them, and has made divers demands of them for relief, and that there have been introduced in the Legislature of the State of New York divers bills for relief, which said bills were passed by the Legislature, but were vetoed by the Mayor of said City and by this defendant, and has written divers times to, and communicated with, the officials of said two cities, and made protests from time to time on account of their inaction in the premises, and demands for payment, all without avail whatsoever.

25th. Your orator further avers that he had refrained up to this time from instituting suit for the reason that he believed that said acts of the Legislature would be approved by the Mayor, or that he would be able to obtain relief without litigation through the divers petitions that he and others have had presented to the municipal authorities for relief, and that it is only within the last few months that he has been forced to the belief, through the inaction of 45 said City and its said officers and agents that his only way to obtain relief was by application to this Court.

26th. Your orator further alleges that heretofore, and on or about the 19th day of March, 1910, and subsequent thereto, he duly served and made demand upon the Comptroller of the City of New York, of the payment to him of the amount covered by said certificates with interest, but that the said City official has at all times refused and failed to comply with said demand and no part of said sum has ever been paid; and your orator further alleges that said City of Long Island, as well as this defendant, have at all times failed, refused and neglected to take any steps or proceedings whatsoever looking towards the enforcement of the liability of Bleekwenn as City Treasurer, or his sureties on his bond, and upon information and belief that said sureties have been dead many years, and neither their estates nor said Bleekwenn are now of sufficient financial ability to answer in damages your orator's claim and of those similarly situated.

27th. Your orator further alleges that heretofore an action was begun in the Circuit Court of the United States, Eastern District of New York, by your orator against the said Frederick W. Bleckwenn, as City Treasurer of Long Island City, praying for certain relief as in the bill of complaint therein specified, in which said action an order was duly made by the Hon. Charles L. Benedict, U. S. District Judge, holding said Court, and entered upon motion of the complainant's solicitor, enjoining and restraining the said defendant, until further order, judgment and decree of said Court, from receiving, upon any redemption from the sales made by him to the com-

plaintant of lands in Long Island City, upon non-payment of
46 assessments levied thereon under the said Act of the Legisla-

ture of the State of New York passed May 5th, 1874, anything except legal tender money of the United States, and also restraining said defendant from entering upon his books as paid any assessments levied under said Act upon said property so bought by the complainant, which property affected thereby had been sold by said defendant thereunder for less than the amount due thereon, but that said City as well as this defendant have at all times since refused to comply with the terms and provisions of said order, and have constantly and frequently since then entered upon said books as paid such assessments, when in reality much less than the full amount of the same had been paid.

Your orator is further informed and believes, and therefore avers, that no further order decree or judgment in said cause was made by said Court or any other Court, and that such order is still in full force and effect.

28th. Your orator is informed and believes, and therefore avers, that said city had for many years prior to its termination by becoming a part of this defendant as aforesaid, and the defendant now has, and for many years has had, in its possession, custody and power certain books, papers, documents and writings relating to the allegations and charges heretofore in this bill set forth, and by which if produced the truth thereof, or of some part thereof, will appear, which said books, papers, documents and writings relate among other things to the time and amount of said certificates issued and the consideration thereof, the amount thereof now outstanding, the amount of assessments laid, the amount of
47 same cancelled or marked as paid, the nature, extent or method of said payment, the dates, times and places of sales

had of lands for non-payment of assessments, the prices therefore realized at said sales, and the nature, extent and method of payment, the times and amounts of redemption made of lands sold, by whom and how made, as well as the amount of the fund established as provided by said Act of 1874, for the payment of said certificates, and the use made thereof; also whether or not by said Frederick W. Bleckwenn, John R. Morris, Francis Tiernan or John L. Tiernan, were at any time between 1873 and 1893, the City Treasurer or Receiver of Taxes of said City of Long Island, and if so when and for what period, and also what appointments, if any, of Commis-

sioners were made by the Mayor of said City under said Act during said period.

29th. Your orator is further informed and believes, and therefore avers, that by reason of said tax assessment sales of said lands for less than the amount of the assessment thereof, with interest, and by reason of said City through its said officers and agents receiving in payment therefor said certificates and not currency of the country, that is, money, and by reason of its and their cancelling the lien of said assessments before the amount of the assessments, with interest thereon, was paid in full, and by reason of the performance of, and failing to perform, the other matters and things hereinabove set forth, the said City and its City Treasurer and Receiver of Taxes as such was guilty of a gross breach of its and their trust duties, by reason of which said fund provided to be raised for payment of said certificates has never been raised, and said certificates have never been paid, all of which acts, doings and pretenses were and are contrary to equity and good conscience, and tend to the manifest wrong,

injury and oppression of your orator in the premises; in
48 tender consideration whereof and for as much as your orator

is utterly remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable; to the end therefore that defendant may, if it can show why your orator should not have the relief hereby prayed, and may according to the best and utmost of its knowledge remembrance, information and belief, full, true, direct and perfect answer make to the allegations in this bill of complaint contained, but not under oath, an answer under oath being hereby expressly waived, your orator prays this Court as follows:

(a) That the said trust be enforced by this Court and an accounting be taken of the amounts that would have been received by said City and its said City Treasurer and Receiver of Taxes from the sales of said lands for non-payment of assessments if the same had been sold as should have been for the full amount of assessments thereon with interest, as in said Act of 1871 provided to be done; and of the part thereof to which your orator, and such others as may be joined herein, would be and are entitled upon said certificates owned by him and them as aforesaid, and that such amount as may be due to your orator, or said other parties upon said accounting as aforesaid, with interest, may be ordered to be paid to your orator and said other parties;

(b) That your orator may have such other and further, or other or further relief in the premises, including final and interlocutory writs and decrees as may be just and equitable and the nature of the case may require, and as to your Honors shall seem meet.

(c) May it please your Honors to grant to your orator a
49 writ of subpoena to be directed to the said defendant "The
City of New York," thereby commanding it at a certain time and under a certain penalty therein to be named to be and appear before your Honors in this Honorable Court, and then and there to answer the matters aforesaid, but not under oath, an answer under oath being hereby expressly waived, and to stand to and abide by

and perform such other and further orders or decrees as to your Honors may seem meet.

And your orator will ever pray, etc.

ALLEN & CHARD,
CHAS. K. ALLEN,
Solicitors for Complainant,
2 Rector Street, New York City.

CHAS. K. ALLEN,
STANDISH CHARD,
LEON ABBETT,
Counsel for Complainants.

50

EXHIBIT A.

Amount.	Issued in name of	No.	Date.
\$200.	Farwell, Sage & Co.	2326	Jan. 6, 1879
1000.	" 465		"
100.	" 2325	June 9, 1879	
100.	" 2291	May 9, 1879	
100.	" 2287	"	
100.	" 2283	"	
100.	" 2279	"	
100.	" 2247	Apr. 7, 1879	
100.	" 2164	Dec. 31, 1878	
100.	" 2142	Dec. 9, 1878	
100.	" 2140	Dec. 9, 1878	
100.	" 2097	Nov. 7, 1878	
100.	" 1956	Aug. 5, 1878	
100.	" 1871	June 3, 1878	
100.	" 1843	"	
100.	" 1843	"	
100.	" 1726	Apr. 1, 1878	
100.	" 1455	Nov. 5, 1877	
100.	" 1454	"	
100.	" 1459	"	
100.	" 1382	Oct. 1, 1877	
100.	" 1378	"	
500.	" 752	Nov. 7, 1878	
500.	" 748	"	
500.	" 739	Oct. 7, 1878	
500.	" 717	Sept. 2, 1878	
500.	" 721	"	
500.	" 690	Aug. 5, 1878	
500.	" 686	"	
500.	" 702	"	
500.	" 658	May 6, 1878	
500.	" 652	"	

51

EXHIBIT B.

\$20.00.

Improvement Certificate.

No. 2326.

State of New York.

LONG ISLAND CITY, January 6th, 1879.

This is to certify that Farwell, Sage & Co. or bearer is entitled to Twenty dollars with interest thereon at the rate of 7 per cent. per annum, from the date hereof, payable out of the Improvement Fund in Long Island City, established under Chapter 326 of the Laws of New York, passed May 5th, 1874, entitled "An Act to provide for improvements in and adjoining the First Ward of Long Island City," this certificate being issued under the provisions of said act, and the said amount and interest being payable as provided therein.

P. G. VAN ALST,
WM. BRIDGE,
H. S. ANABLE,

\$20.

Commissioners.

Countersigned,

JOHN R. MORRIS,
\$20. *Treasurer of Long Island City.* \$20.

(Copy of back.)

This Certificate is one of the Improvement Certificates in Long Island City issued under the provisions of the act within mentioned. It draws interest at the rate of 7 per cent. per annum and is receivable at par and accrued interest at any time in payment of any assessment laid under said act and of the accrued interest on such assessment.

ALLEN & CHARD.

52 STATE OF NEW YORK,

*County of New York,**Southern District of New York, ss:*

Charles K. Allen, being duly sworn, deposes and says:

He is an attorney and counsellor at law and one of the counsel and solicitors for the above named complainant, and that he resides at No. 311 West 95th Street, Borough of Manhattan, City, County and State of New York; he has read the foregoing bill of complaint signed by him, and knows the contents thereof, and that the same, and the matters therein contained and set forth, are true to the knowledge of deponent, except as to those matters therein stated to be alleged on information and belief, and as to them he believes it to be true.

Deponent further says that the grounds of his belief as to all matters therein not stated of his knowledge are as follows: Examination of the certificates of indebtedness and of other documents referred to

in the bill of complaint, interviews held with complainant and others, and an examination of the statutes referred to in said complaint.

Deponent further says that the reason this verification is not made by complainant is that the complainant resides without the State of New York, and is now outside the State of New York.

CHAS. K. ALLEN.

Sworn to before me this 18th day of July, 1910.

[SEAL.]

ERNEST L. HOPKINS,
Notary Public, New York County.

Answer.

Circuit Court of the United States for the Southern District of New York,

In Equity.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

The answer of The City of New York, the defendant above named, to the bill of complaint of the above named complainant.

This defendant now and at all times saving and reserving to itself all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or unto so much or such parts thereof as this defendant is advised that it is material or necessary for it to make answer unto, answering, says:

I.

This defendant does not know and cannot set forth as to its belief or otherwise as to the statements contained in the paragraphs numbered respectively "3rd," "4th," "9th," "10th," to and including the words "in fee simple to the highest bidder" in folio 62 of the complainant's bill of complaint, "16th," "18th," "19th," "21st," "25th" and "27th" of the said bill and as to the statements contained in Subdivision "1" of Paragraph "5th."

54 II.

Answering the allegations in Paragraph "7th" of said bill of complaint contained, this defendant denies, upon information and belief, that the Commissioners, Assessors, City Treasurer and Receiver of Taxes were local officers and agents of and for Long Island

City in performing all of the matters and things in said Act of 1874 provided for, intended to be and actually employed under said act of the Legislature in the conduct of local improvements.

III.

Further answering the statements contained in Paragraph "10th," this defendant alleges, upon information and belief, that Chapter 656 of the Laws of 1886 was and is not unconstitutional, null and void for the reasons in said Paragraph "10th" stated, or for any other reason.

IV.

Further answering the statements contained in Paragraph "10th," this defendant, upon information and belief, denies that it was the duty of the former City of Long Island City, through its Common Council or other agents, to see to it that no sale of any lands should be made for non-payment of assessments thereon for less than the full amount thereof, with interest, and to be represented at said sales for said purpose and to bid in and purchase said lands at said sales, thereafter disposing of them for such an amount as would be sufficient to pay the assessments thereon with interest.

V.

Further answering, defendant denies, upon information and belief, the allegations contained in Paragraph "11th" of complainant's bill of complaint.

VI.

Further answering, this defendant denies, upon information and belief, the allegations contained in Paragraph "14th" of complainant's bill of complaint.

VII.

Further answering this defendant denies, upon information and belief, the allegations contained in Paragraph "15th" of complainant's bill of complaint.

VIII.

Answering the statements contained in Paragraph "17th" of complainant's bill of complaint, defendant admits that it has not paid any of the certificates therein mentioned, but denies upon information and belief the other allegations in the said paragraph of the bill of complaint contained.

IX.

Further answering, this defendant denies, upon information and belief, the allegations contained in paragraph "20th" of complainant's bill of complaint.

X.

Answering the statements contained in Paragraph "24th" of complainant's bill of complaint, defendant admits that various bills seeking relief were introduced in the Legislature of the State of New York in behalf of complainant and others, which bills were passed by the Legislature and vetoed by the Mayor of the City of 56 New York, and that they have written divers times to and communicated with the officials of said two cities, but this defendant denies, upon information and belief, the other allegations in said Paragraph "24th" of complainant's bill of complaint contained.

XI.

Answering the statements contained in Paragraph "26th" of complainant's bill of complaint, defendant admits that it has not taken any steps or proceedings against Bleckwenn, as City Treasurer, but defendant does not know and cannot set forth as to its belief as to the other statements Paragraph "26th" of complainant's bill of complaint contained.

XII.

Answering the statements contained in Paragraph "28th" of complainant's bill of complaint, defendant admits that it has in its possession certain books, papers, documents and writings relating to the allegations and charges in complainant's bill of complaint contained, but for greater certainty, they crave leave to refer to said books, papers, documents and writings when produced, but as to the other statements contained in said paragraph of complainant's bill of complaint, defendant does not know and cannot set forth as to its belief or otherwise.

XIII.

Further answering, this defendant, upon information and belief, denies the allegations in Paragraph "29th" of complainant's bill of complaint.

XIV.

Further answering, this defendant admits that the laws mentioned in complainant's bill of complaint were enacted, but for greater certainty as to the effect thereof and as to their contents craves leave to refer thereto when produced.

XV.

And this defendant, in addition to the foregoing, avers that the complainant's alleged cause of action, if any there may be arising to the complainant on account or by reason of the several allegations and complaints in the said bill of complaint, did not accrue within six years before the said bill was filed, and this allegation

the defendant makes in bar of the complainant's bill, and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

XVI.

And this defendant, in addition to the foregoing answer, avers that the complainant's alleged cause of action, if any there may be arising to the complainant on account of or by reason of the several allegations and complaints in the said bill of complaint, did not accrue within twenty years before the said bill was filed, and this allegation the defendant makes in bar of the complainant's bill, and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

XVII.

And this defendant, in addition to the foregoing, avers that complainant, by reason of his supineness and laches in not seeking to protect his rights, before the filing of his bill of complaint by 58 taking measures to prevent the acts in his bill of complaint alleged to have been wrongful and in contravention of his rights, and in not endeavoring before the filing of his bill of complaint to raise the question of the unconstitutionality of the acts of the Legislature of the State of New York therein alleged by him to be unconstitutional, and by reason of his allowing the alleged wrongful acts complained of in his bill of complaint to continue for many years without objection or protest, to the great prejudice, injury and damage of this defendant, has lost and waived all rights, if any he had, to relief at the hands of this Court, and this allegation the defendant makes in bar of the complainant's bill, and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

Wherefore, defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

ARCHIBALD R. WATSON,
Corporation Counsel, Solicitor for Defendant.

Office and Post Office Address, Hall of Records, Borough of Manhattan, New York City.

LOUIS H. HAHLO,
Of Counsel for Defendant.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

George L. Sterling, being duly sworn, deposes and says:
That he is Acting Corporation Counsel of The City of New York,
the corporation defendant above named, and that he is
59 acquainted with its business; that he has read the foregoing
answer and knows the contents thereof; that the same is true

to the knowledge of deponent, except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

G. L. STERLING.

Subscribed and sworn to before me this 12th day of April, 1911.

[SEAL]

EDWARD A. McSHANE,
Notary Public, New York County.

I hereby certify that the foregoing answer is, in my opinion, well founded in point of law.

Dated, New York, April 12, 1911.

LOUIS H. HAHLO,
Counsel for Defendant.

Replication.

UNITED STATES CIRCUIT COURT, for the Southern District of New York.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

The Replication of the Above Named Plaintiff to the Answer of the Above Named Defendant.

This replicant saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable Court shall direct, and humbly as in and by his said bill he has already prayed.

ALLEN & CHARD,
CHAS. K. ALLEN,
Solicitors for Complainant.

STANDISH CHARD,
CHAS. K. ALLEN,
LEON ABBETT,
Counsel for Complainant.

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Order Providing for Examination of Witnesses.

District Court of the United States for the Southern District of New York.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

Upon reading and filing the annexed stipulation consenting to the appointment of Mr. Barker D. Leich, a Notary Public, of 55 John Street, Borough of Manhattan, New York City, to take testimony on behalf of the plaintiff and on behalf of the defendant pursuant to order in this cause dated March 5th, 1913; it is

Ordered that the testimony of Elias C. Benedict, 80 Broadway, New York City, Henry S. Kearny, 100 Broadway, New York City, C. Rehmke, 25 East 133d Street, New York City, and such other witnesses as the plaintiff or defendant may call, be taken before Mr. Barker T. Leich, at his office, 55 John Street, or at such other place as may be agreed upon that the testimony so taken shall be signed and sworn to by the respective witnesses and after being duly certified by the said Notary shall be filed in the office of the Clerk of this Court.

Dated, New York City, March 24th, 1913.

J. M. MAYER, D. J.

62

Testimony of Witnesses.

District Court of the United States for the Southern District of New York.

ELIAS C. BENEDICT, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Examination of Witnesses before Barker D. Leich, as Commissioner,
Held at No. 55 John Street, New York City, on the 18th Day of April, 1913.

Appearances:

The Complainant, Elias C. Benedict, by Allen & Chard, Solicitors, Charles K. Allen, Esq., of Counsel.

The Defendant, The City of New York, by Corporation Counsel, Louis H. Hahlo, Esq., of Counsel.

The Commissioner states that he has taken his oath of office.

ELIAS CORNELIUS BENEDICT, being duly sworn, testified as follows:

By Mr. Allen:

Q. Please state your full name.

A. Elias Cornelius Benedict.

Q. What is your business?

A. I am a member of the Stock Exchange; stock broker. I will be a member for fifty years next June.

Q. Where is your office?

A. No. 80 Broadway, New York City.

63 Q. You reside in Greenwich, Connecticut, do you not?

A. Yes, sir.

Q. You are a citizen of Connecticut and of this country?

A. Yes, sir.

Q. Mr. Benedict, I show you the following certificates:

Improvement Certificates.

No.	Date.	Issued to—	Amount.
2164	Dec. 31, 1878	Farwell Sage & Co.....	\$ 100.
2247	Apr. 7, 1879	Farwell Sage & Co.....	100.
2279	May 9, 1879	" "	100.
2283	May 9, 1879	" "	100.
2287	May 9, 1879	" "	100.
2291	May 9, 1879	" "	100.
2325	June 9, 1879	" "	100.
465	Jan. 6, 1879	" "	1000.
2326	Jan. 6, 1879	" "	20.
2142	Dec. 9, 1878	" "	100.
2140	Dec. 9, 1878	" "	100.
2097	Nov. 7, 1878	" "	100.
1956	Aug. 5, 1878	" "	100.
1871	June 3, 1878	" "	100.
1848	June 3, 1878	" "	100.
1843	June 3, 1878	" "	100.
1726	Apr. 1, 1878	" "	100.
1455	Nov. 5, 1877	" "	100.
1454	Nov. 5, 1877	" "	100.
1459	Nov. 5, 1877	" "	100.
1382	Oct. 1, 1877	" "	100.
1378	Oct. 1, 1877	" "	100.
752	Nov. 7, 1878	" "	500.
748	Nov. 7, 1878	" "	500.
739	Oct. 7, 1878	" "	500.
717	Sept. 2, 1878	" "	500.
721	Sept. 2, 1878	" "	500.
690	Aug. 5, 1878	" "	500.
686	Aug. 5, 1878	" "	500.
702	Aug. 5, 1878	" "	500.
658	May 6, 1878	" "	500.
652	May 6, 1878	" "	500.

64 These are the certificates that are mentioned in the exhibit to the bill of complaint which I obtained from your office. Are you the owner of these?

A. I am.

Q. How long have you been the owner of them?

A. About forty years.

Q. Mr. Benedict, were you a member of the firm of Benedict, Flower & Co.?

A. I was.

Q. Was Mr. Flower of that firm subsequently Governor Flower?

A. Yes, sir.

Q. The firm of Benedict Flower & Co. dissolved in the late seventies, did it not?

A. About 1875.

Q. Did you know the firm of Farwell, Sage & Co.?

A. I did.

Q. They were the contractors, were they not, for some of the First Ward Long Island City improvement work?

A. Yes, sir.

Q. Did the firm of Benedict, Flower & Co. advance any moneys to Farwell, Sage & Co. for this improvement work?

Objected to by Mr. Hahlo as incompetent, irrelevant and immaterial; exception.

A. I think they furnished nearly all for the filling.

Q. Do you know whether Farwell, Sage & Co. were paid for the work which they did in the improvement certificates?

Same objection by Mr. Hahlo; exception.

Mr. Hahlo: I am objecting to the form of the question.

A. So far as I know, in every case.

Q. For the moneys that were advanced by Benedict, Flower & Co. to Farwell, Sage & Co., did the firm of Benedict, Flower & Co. receive payment in certificates?

A. Always.

Same objection by Mr. Hahlo: exception.

65 Q. Are these some of the certificates? I refer to the certificates I have shown you heretofore?

A. Yes, they are the same form of certificate, but of a later date than those I received as one of the firm. The explanation is that Paige, a Trustee in Union College having a large amount of property in Long Island City, desired me to loan him some certificates which I did with a promise of return in kind. That explains why the certificates he returned in the place of those I gave him bear several years later date.

Mr. Hahlo: I move to strike out all the testimony beginning with the words "the explanation" on the ground that it is incompetent, irrelevant and immaterial; exception.

Q. I understand that the firm of Benedict, Flower & Co., received

payment for the moneys advanced by it to Farwell, Sage & Co. in certificates.

A. Yes, sir.

Q. When the firm of Benedict, Flower & Co. dissolved in the seventies, you took some of these certificates as your share?

A. Yes. We had no formal dissolution papers. We just divided the assets after paying the debts. There was never any dispute thereafter.

Q. These certificates I have shown you are some of the certificates which you received on the dissolution?

A. Yes, same kind.

Q. Do you know Mr. Charles Wanninger?

A. I do.

Q. Have you known him for any number of years?

A. About forty years, I think.

Q. Did you ever have conversations with him in regard to his representing you in the collection of these certificates?

A. Yes, many times.

66 Q. Is Mr. Wanninger in the room?

A. He is sitting here, sir.

Q. Did you at any time give Mr. Wanninger any authority in regard to the improvement certificates?

Mr. Hahlo objects on the ground that the question is improper in form and on the further ground that it is incompetent, irrelevant and immaterial; exception.

A. He has had continuous authority from me for twenty or thirty years to act in my behalf toward the collection of these debts from Long Island City.

Q. Have you ever been paid anything by the City of Long Island City or the City of New York?

A. Not a cent.

Q. Then these certificates are entirely unpaid?

A. Absolutely.

Q. Have you been the holder and owner of these certificates ever since you acquired them?

A. I have.

Q. Can you state in round numbers, the amount of money that the firm of Benedict, Flower & Co. advanced to Farwell, Sage & Co. that you referred to before?

A. It was a good many hundred thousand dollars.

Q. Was it at least a hundred thousand dollars?

A. Oh, yes.

Q. Do you think it was at least two hundred thousand dollars?

A. Yes, I do.

Q. These moneys advanced covered all the certificates that Benedict, Flower & Co. acquired on the work?

A. We received certificates according to the contract with Farwell, Sage & Co. for the cash advances made them during their work.

Q. Do you know whether about July 19, 1877, you purchased

any certificates, and if so, how much and what was paid for
67 them?

A. On July 19, 1877, I bought a thousand dollars' worth
of these certificates and paid \$750 for them.

By consent, cross examination of Mr. Benedict deferred.

E. C. BENEDICT.

Sworn to before me this 19th day of April, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, No. 37, Kings County.

Certificate filed in Kings County Register's Office No. 4936. New
York County Clerk's Office No. 19, and New York County Regis-
ter's Office No. 4087.

District Court of the United States for the Southern District of
New York.

ELIAS C. BENEDICT, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

GEORGE E. CLAY, being duly sworn, testified as follows:

By Mr. Allen:

Q. What is your full name?

A. George E. Clay.

Q. Where do you reside?

A. At No. 167 11th Street, Long Island City, Borough of Queens.

Q. What is your business?

68 A. Real estate business and builder. General real estate
business. Office No. 9 Jackson Avenue, Long Island City.

Q. Were you at any time connected in an official capacity with
the Commissioners appointed under the Act of 1874 for the im-
provement of Long Island City?

A. Yes, I was an Assistant Engineer.

Q. In what years were you Assistant Engineer?

A. From about July 1, 1876, to the first part of 1880 or the lat-
ter part of 1879.

Q. Were you present at a tax sale held in Long Island City in
1886?

A. Yes, sir.

Q. Do you know what years were covered by that sale?

Mr. Hahlo: I object to the question on the ground that the writ-
ten records are the best evidence and that the evidence sought to be
adduced is mere hearsay. Exception.

A. All the taxes up to 1883.

Q. You say 1883?

A. Well, 1883 and prior.

Q. How long prior?

A. From 1870.

Q. Do you know whether or not the lands that were sold at this sale were sold for less than the amount of the tax lien, or otherwise?

Mr. Hahlo: I object to the question on the ground that the record is the best evidence and on the further ground that some of the parcels might have been sold for more and some for less; it does not show that particular parcels for which liens were sold were sold for less or for more. Exception.

Q. Before you answer this question, I qualify it by asking you how the lands were generally sold at this sale?

Mr. Hahlo: I object on the ground that you are not asking 69 in regard to any particular sale and do not refer to anything else but the general course of conduct while this action refers to a particular occasion. Exception.

A. The larger part of the properties was always sold for the full amount of the lien.

Q. What official of the City of Long Island City conducted this sale?

Mr. Hahlo: I object on the ground that the evidence sought to be adduced is incompetent, irrelevant and immaterial. Exception.

A. The Treasurer and the Receiver of Taxes in and for Long Island City.

Q. Do you know his name?

A. Frederick W. Bleckwenn.

Q. Did you have any conversations with the Treasurer of Long Island City who conducted this sale at or about the time the sale was had, in regard to the method of conducting the sale?

Mr. Hahlo: I object on the ground that any conversation that this witness had with the Treasurer of Long Island City is not binding upon the City of New York, and is incompetent, irrelevant and immaterial.

A. I did.

Q. State that conversation.

Same objection; exception.

Mr. Hahlo: I object to the question upon the further ground that the evidence sought to be adduced relates to properties other than those against which these certificates were issued. Exception.

A. The conversation I had with Mr. Bleckwenn was concerning the former First Ward of Long Island City. I had notice that several properties had been knocked down for less than the amount of the taxes and accrued interest, I protested to Mr.

Bleckwenn that I did not consider it proper—I was a real estate dealer and expert at that time—that the property should be sold for less than the accumulated liens against it. Mr. Bleckwenn stated that he considered it entirely optional with him at what price the property should be sold or under what terms, and if he considered that the property was not worth the amount of the lien, he considered that he had perfect right and authority to sell the property for what it would bring so as to give Long Island City cash instead of a certificate of sale. I told him that I was interested as part owner of certain lots in the First Ward of Long Island City, and these lots were in the improvement district of Long Island City for which improvement certificates were issued. I told him that under these circumstances if he intended to sell those lots, I would make some money through these sales. A few days afterwards, Mr. Bleckwenn put up for sale the lots that I was interested in lying in the First Ward of Long Island City and within the improvement section. I bought those lots in for about one-third of the accumulated amount of taxes and interest. I told Mr. Bleckwenn afterwards that I had done this and I told him I was in pocket and I should advise other people to follow the same thing unless he changed his plans. Mr. Bleckwenn said he would consider the matter.

Q. Were any tax sales held subsequent to these conversations with Mr. Beckwenn?

A. Yes.

Q. If so, state if you can of your own knowledge, whether these sales were such that property was sold for the full amount or for less than the amount of the taxes.

Same objection; exception.

71 A. I think that every lot sold after these conversations was bought in by Long Island City for the full amount of the liens.

Q. Mr. Clay, I understand that you were Assistant Engineer for some years on the First Ward, Long Island City, Improvement Commission.

A. Yes, sir.

Q. Were you present at the first assessment sale that was had?

A. I was.

Q. Do you know what year that was in?

A. Somewhere around 1886.

Q. Was it 1888?

A. It was probably about 1888.

Q. Do you know when the assessments on this First Ward property were levied—how long before the first sales took place?

Mr. Hahlo: I object to the question on the ground that it calls for a mere matter of record and the records are the best evidence. Exception.

A. About 1878 or 1879. It was while I was with the Improvement Commission.

Q. On what part of the First Ward of Long Island City were the first assessments made?

Same objection; exception.

A. One on what was known as the western Section of the improvement area. Under the act, the entire area of improvement was in three sections. The first extended from the East River to Jackson Avenue. The middle section extended from Jackson Avenue, easterly to the Canal and the easterly section extended easterly along the improvement territory. The first assessments were levied in the westerly district or the old Hunter's Point district.

Q. At this first assessment sale that took place in 1888, do 72 you know whether or not the lands were sold for the amount of the assessments or for less?

Mr. Hahlo: Objection to the question as incompetent, irrelevant and immaterial; on the ground that the records are the best evidence and that it is not proven that the sales related to the property against which these particular certificates were issued. Exception.

Q. I qualify that question and ask you to state whether or not at this sale in 1888 the lands sold were lands covered by the First Ward Long Island City assessment specified in the Act of 1874?

Objection renewed; exception.

A. The sales were for the assessments beginning in 1888 and covered what was called the western district of the First Ward improvement territory which was laid out by Act of 1874 and on which improvement certificates were issued to pay for the improvements in this entire improved territory including the western section in which the lots that were sold were situated.

Q. I do not think you have answered the first part of my question which was whether or not the lands sold for the full amount of the assessments or for less.

Same objection; exception.

A. In this first sale, which was the built up portion of the entire improvement territory, to the best of my knowledge and belief and according to my records, every lot brought the amount of the assessment and interest and in some cases the sale exceeded the amount of the assessment and interest, and I do not know of any lot in that 73 west improvement section that was sold for less than the amount of the assessment and improvement thereon.

Q. In those cases where you say a surplus was sometimes produced, do you know how the buyer paid for the surplus? And do you know how he paid for the original amount of the assessment and interest?

Mr. Hahlo: I object to the question as incompetent, irrelevant and immaterial. The witness has not been shown to qualify to testify. Exception.

A. Yes, I do know.

Q. How?

A. The amount of the assessment and interest was paid for by improvement certificates and any surplus or excess of such liens for which the property was sold was paid for in cash to the City Treasurer.

Q. Do you know whether or not redemption was allowed upon land sold at assessment sales and if so do you know how the owner was allowed to redeem them?

A. Yes.

Same objection and exception.

A. The owner was allowed at first by the City Treasurer to redeem after these assessment sales by paying to him improvement certificates with interest thereon to the amount of the assessment lien and he required that the interest on such sales and the surplus of such sales, and the interest on the surplus should be paid to him in cash. Subsequently, this plan of redemption was modified and the owner of the property was permitted to redeem from the assessment sale by the payment of the assessment and interest thereon in improvement certificates, but was required to pay the surplus of the sales and interest on the surplus in cash.

74 Q. I understand that at the sale in 1888, the purchaser of the property was allowed to use improvement certificates?

A. Yes. The purchaser buying in paid to the City Treasurer the amount of the original assessment and interest thereon in improvement certificates. And any surplus had to be paid in cash.

Q. Do you know what became of these certificates used by the purchaser?

A. They were cancelled by the City Treasurer.

Same objection and exception.

Q. Do you know what medium of redemption was used by the former owner when he redeemed? Did he redeem in cash or these certificates?

Same objection; exception.

A. I redeemed a great many myself, and others redeemed as owners, by the payment of improvement certificates to cover the amount of the assessment and interest thereon as I have already stated. The surplus and interest thereon was paid in cash.

Q. Do you know what became of these certificates that were turned in by the former owner upon redemption?

A. The purchaser at the sale was notified that the property had been redeemed from these sales and that improvement certificates were there waiting for him to accept, or subject to his order.

Same objection; exception.

Q. When you first went on the work in 1876, had any assessments been levied?

- A. No, none at all.
Q. I understand that when a person redeemed any certificates,
the purchaser at the sale was notified that his certificates used
75 by the former owner of redemption were subject to his dis-
posal?

A. Yes.

- Q. These certificates that were turned over to a purchaser after
the property had been redeemed by the former owner, the purchaser
had the right to use in any way that he saw fit, did he not?

Mr. Hahlo: I object to the question on the ground that the law
under which these certificates were issued is the best evidence and
this is merely a matter of opinion; exception.

A. I understand that they were his private property and that he
could do with them as he pleased.

Q. About when was this improvement work in the First Ward
begun?

A. 1875.

Q. Do you know who the contractors for the filling were?

Mr. Hahlo: Objection on the ground that the question is incom-
petent, irrelevant and immaterial; exception.

A. Farwell, Sage & Co.

Q. Do you know, as a matter of fact, whether the contractors and
special contractors were paid for the work done in certificates?

Mr. Hahlo: I object to the question as incompetent, irrelevant
and immaterial; exception.

A. Yes.

Q. How were they paid?

Same objection; exception.

A. They were paid generally in improvement certificates in the
first few years. Subsequently they were paid in improvement
76 certificates and cash realized by the Commissioners from the
sale of improvement certificates.

Q. Do you know how the employees of the Commission were paid,
whether in certificates or cash?

Objected to as incompetent, irrelevant and immaterial.

A. When I was connected with the Board, I received nothing
but improvement certificates the same as all the other employees
were paid through that period. The certificates were drawn to our
individual orders.

Q. Do you know who the financial backers of Farwell, Sage &
Co. were?

A. Yes.

Objected to as incompetent, irrelevant and immaterial.

Q. Who were the financial backers?

Same objection; exception.

A. Roswell P. Flower & Co.

Q. Do you know whether or not the financial backers of Farwell, Sage & Co. were paid in certificates for the moneys advanced to Farwell, Sage & Co.?

Same objection; exception.

A. I do not know.

Q. Who conducted the assessment sale in 1888?

A. The Treasurer and Receiver of Taxes in Long Island City—Frederick W. Bleckwenn.

Q. Were you present at the assessment sales had in 1892 and 1893?

A. Yes.

Q. Do you know whether or not at these sales for assessments had in 1892 and 1893, the lands were sold for more or for less than the amount of the assessment liens?

77 Mr. Hahlo: I object to the question on the grounds as heretofore stated; exception.

A. Yes.

Q. In general, were they sold for more or for less?

Same objection; exception.

A. In every case, they were sold for less than the amount of the assessment lien and interest thereon. I do not know of a single case where they sold for more.

Q. Do you know at the time of the sales in 1892 and 1893 what the approximate amount of the assessments was compared with the certificates uncancelled?

A. The assessments were in excess of the amount of the certificates issued. I figured that up while I was Assistant Engineer.

Q. After the sales in 1892 and 1893 were completed, were there any certificates outstanding uncancelled?

A. Yes, a large quantity.

Q. Give me the approximate amount?

A. I approximate it at about three hundred thousand dollars' worth face value of the unredeemed and uncancelled certificates.

Q. When the City Treasurer sold the pieces of land at the assessment sale and received certificates in payment, were any entries made on the books in regard to the assessment?

Mr. Hahlo: I object to the question on the ground that the books are the best evidence and that the evidence sought to be adduced is not binding upon the City of New York, and on the further ground that it is incompetent, irrelevant and immaterial; exception.

78 A. Yes. I have seen such entries on the books.

Q. Do you know whether or not the cancellation of the assessment liens that you have testified to leaving assessment certificates outstanding, had any effect upon the value of these certificates?

Mr. Hahlo: I object on the ground that the question calls for a conclusion; further, that it calls for opinion evidence, and further, it is incompetent, irrelevant and immaterial; exception.

A. Yes, I do.

Q. Answer. State, if you know of your own knowledge, what effect it had upon the value of the certificates?

Same objection; exception.

A. The improvement certificates became a drug on the market and little or no call was made for purchases of these certificates.

Q. Can you state the market values of these certificates at various times from the year 1877 down to the present time?

A. Yes.

Q. Have you purchased them and sold them and dealt in them?

A. I have.

Q. Have you any records with you showing the amounts received by you or paid by you at various times for these certificates?

A. Yes, I have a schedule taken from my check book.

Q. The amounts you paid for them, I assume, were not greater than the market value.

A. They were about the market value.

Q. Will you state the market values of these certificates at various times as evidenced by purchases made by you?

Mr. Hahlo: I object on the ground that the testimony is
79 incompetent, irrelevant, immaterial and not binding upon
the defendant, and that the witness is not qualified to testify.
Exception.

Witness produces and refers to following schedule:

Purchases of First Ward Long Island City Improvement Certificates Made by Mr. George E. Clay.

Date.	Face.	Value.	Rate.	Cash.
1879.				
Mch. 7.....	\$1500	\$1554.95	50c	\$777.47
" 12.....	1500	1555.24	50c	777.62
" 7.....	1000	.....	...	.....
" 12.....	1500	1549.99	50c	770.00
Aug. 8.....	600	621.47	50c	310.73
Dec. 24.....	1000	1004.22	...	498.50
1880.				
Jan. 13.....	520	.....	47c	253.50
Feb. 1.....	2000	.....	47c	974.80
" 18.....	600	.....	47c	292.50
July 14.....	1500	.....	47c	692.10
" 22.....	760	.....	47c	326.25
Aug. 26.....	700	.....	...	309.71
Sept. 15.....	3000	3061.58	42½c	1301.16
" 16.....	11500	12127.50	41½c	5025.33
" 18.....	800	811.88	43½c	336.42

Date.	Face.	Value.	Rate.	Cash.
Oct. 6.....	1200	1235.44	43½c	542.05
Nov. 15.....	1000	1048.03	43½c	459.82
" 15.....	3000	3061.25	40c	1224.50
1881.				
Feb. 23.....	1200	1259.64	40c	503.86
Apl. 14.....	6300	.....	40c	.....
" 27.....	1100	1194.35	40c	.....
Oct. 14.....	1300 and ½ interest		40c	555.04
1882.				
Jan. 10.....	2480 and ½ interest		40c	1131.29
Apl. 10.....	1720 and ½ interest		50c flat	860.00
" 14.....	1200 and ½ interest		45c	804.00
1883.				
July 27.....	500	643.99	48c	309.09
Aug. 2.....	2000	3097.61	48c	1486.85
" 6.....	1480	.....	48c	710.00
1884.				
Jan. 16.....	1000	1577.26	47c	741.31
Sept. 4.....	520	624.45	58c	362.20
" 25.....	500	664.26	58c	385.27
80				
1885.				
Jan. 7.....	1000	1340.55	52c	695.00
Apl. 27.....	300	470.52	56c	263.50
May 4.....	660	1091.25	55c	600.19
" 13.....	280	466.75	55c	256.71
" 21.....	1000	1677.94	55c	922.86
June 4.....	600	1011.93	55c	556.56
" 6.....	500	671.42	55c	369.28
Aug. 12.....	500	621.86	56¼c	352.61
Check books missing to April, 1886.				
1886.				
July 30.....	1200	1465.72	50c	732.86
1887.				
Mch. 18.....	300	492.56	45c	221.65
Aug. 10.....	500	830.93	45c	373.92
Dec. 21.....	1000	1853.42	42½c	787.70
" 30.....	200	328.88	45c	148.00
1889.				
Jan. 17.....	500	784.60	45c	353.07
Sales Made by Mr. Clay.				
1901.				
July 3.....	1000	2422.00	25c	605.15
1902.				
June 24.....	300	498.00	25c	124.67

Q. The figures on this schedule are correct, are they?

A. Yes, they are taken from my check book. They begin in March, 1879. I have been unable to find my check book prior to that time.

Q. You dealt in all these certificates during the years covered by this schedule?

A. Yes, extensively.

Q. Do these figures, in your opinion, represent the market value of the certificates at the times specified?

Same objection; exception.

A. I can tell you that they do. Prior to March, 1879, I was an employee of the Improvement Commission and my salary was paid in improvement certificates. My first salary in 1876 was at 81 the rate of one hundred dollars a month in improvement certificates. As the sale of improvement certificates — it became harder and harder * * *. When I went in as an employee, I was paid at the rate of one hundred dollars a month in improvement certificates. At that time—1876—we could realize from ninety-five to ninety cents on our certificates. Later on, as more certificates were issued and more work done, we could not dispose of our certificates at this old price. There was finally a small increase in our salaries until we got down to about fifty cents on the dollar.

Q. Do you know what the market value of the certificates is now?

Mr. Hahlo: I object on the ground that the question is incompetent, irrelevant and immaterial. The witness has not been proven to be an expert. Exception.

A. I have not disposed of any certificates for probably five, or six or seven years.

Q. Were you dealing in these certificates five or six years ago at all?

A. I do not remember unless it is on my schedule.

Q. I notice in June, 1902, on your schedule, that you sold certificates at twenty-five cents on the dollar. Was that price about the market value?

A. Yes.

Mr. Hahlo: I object on the ground that the question has already been answered.

Q. Is there any market for the certificates now so far as you know?

A. I have had no inquiry for improvement certificates since 1902 or 1903. I have always bought the certificates of sale.

On consent, hearing adjourned subject to call of the Commissioner.

82 Examination continued, May 2, 1913, at 2 P. M., at No. 55
John Street, New York City.

Mr. Allen: I ask the Commissioner to mark for identification the Long Island City improvement certificates referred to in the Schedule to the bill of complaint and which Mr. Benedict testified were his property. I suggest for the purpose of convenience that the envelope be marked to identify the contents.

Mr. CLAY recalled.

By Mr. Allen:

Q. I find that you testified at folio marked "33" that when the City Treasurer and Receiver of Taxes sold parcels of land receiving improvement certificates in payment, that entries were made on his books and that you had seen such entries. Will you please state what such entries are?

Mr. Hahlo: I object on the ground the question is incompetent, irrelevant and immaterial and not binding upon the defendant that this is not the best evidence.

Mr. Allen: I file with the Commissioner a notice to produce. Same received by the Commissioner and placed on file.

Mr. Hahlo: The defendant, The City of New York, offers to produce at the next hearing all records called for in the notice to produce. The reason such records are not produced today is that there are three or four wagonloads to be produced to comply with the demand of the plaintiff and if the plaintiff will point out specifically just what records he wants produced, and will 83 absolve the defendant from the production of all the records called for, they will be produced immediately.

Mr. Allen: I wish to state on the record with reference to the records called for by the notice to produce that the documents therein specified were to be produced at the next hearing. I call upon the representative of the City to produce the documents.

Mr. Hahlo: The representative of the City asks for a reasonable time within which to produce the records on the ground that the records are so bulky that it will take days to find the papers required as they have not been in use for many years.

Mr. Allen: In opposition to the request for an adjournment, I state that I served the notice to produce on April 21, 1913, and have had no request for an adjournment and received no objection from the corporation counsel to producing the books and complying with my notice to produce and with the rule of evidence that to prove the contents of a public document, it is not necessary to produce the document itself. I offer the witness to prove the matters with reference to which he will testify.

Same objection; exception.

A. That question is not very clear to me.

Q. I understand from your former testimony that when the City Treasurer sold lands at assessment sales, and received improve-

ment certificates in payment, that he made certain entries upon the books in regard to the assessment. I understand that you testified that you have seen such entries. If he made any such entries on the books, what were those entries?

84 Mr. Hahlo: I object on the ground that it is incompetent, irrelevant and immaterial and the further ground that it is not the best evidence and not binding on the defendant. I also offer to produce at any convenient time the original of such books, if such books are in existence. Exception.

A. The question is not very clear to me. When the property was sold for the assessments, the City Treasurer had a duplicate copy of the certificate of sale and he entered on that certificate of sale—generally stamping it on the back—that the plot was sold and was redeemed on such a date by certain certificates.

Q. I do not want to bring out at this point what entry was made at the time of redemption but whether any entry was made in regard to the assessment.

Objection renewed; exception.

A. On the assessment roll it was stamped or written "sold" on such and such a date.

Q. Was any entry made against the assessment itself showing that the assessment was satisfied or cancelled or anything of that sort?

Same objection; exception.

Q. So far as you know?

A. Only by the issue of the certificate of sale.

Q. Do you know whether or not at the assessment sales in 1892 and 1893 purchasers of the property were allowed to make payment for the property purchased in improvement certificates.

Mr. Hahlo: I object to the question as incompetent, irrelevant and immaterial. On the further ground that it is not binding on the defendant. Exception.

Q. Do you know whether or not any certificate or document was issued to purchasers at assessment sales by the City Treasurer and if so tell us what this document was?

Same objection; exception.

A. Yes. There was a certificate of sale for the assessment stating the date of the sale and the amount for which it was sold.

Mr. Hahlo: I move to strike out the evidence on the ground that the certificate is the best evidence; exception.

Q. Do you know whether or not these certificates of sales were dealt in, that is bought and sold?

Mr. Hahlo: Objection on the ground that the evidence is in-

competent, irrelevant and immaterial; on the further ground that it is not the best evidence and is not binding upon the defendant; exception.

A. They were sold and transferred by assignment.

Q. How do you know this?

A. Because I bought a great many of them. Several thousands of dollars worth of them. I have seen them endorsed by the different holders and seen the affidavit and acknowledgement on the back of the certificate of sale taken by a notary after the assignment. I have handled hundreds of them.

Q. Can you state whether or not the cancellation by the City Treasurer of assessment liens leaving improvement certificates outstanding had any effect on the market value of the certificates sold?

Mr. Hahlo: Objection on the ground that it is incompetent,
86 irrelevant and immaterial; on the further ground that the witness is incompetent to testify and is not an expert nor has he qualified as such. Exception.

A. To the best of my knowledge, belief and experience it had.

Q. What effect did it have?

Same objection; exception.

A. It caused the improvement certificates themselves to be virtually unmarketable. There was no demand for them at all.

Q. You have testified that the City Treasurer in the assessment sales of 1892 and 1893 sold the lands assessed for less than the amount of the assessments. If this is so, state, if you can, if this fact had any effect on the value of improvement certificates and if so, state what the effect was.

Mr. Hahlo: I object on the ground that the question is speculative and the witness has not shown himself qualified to answer the question; exception.

Q. Before you answer, I will ask you this question. Have you dealt in—bought, sold and exchanged improvement certificates?

A. Yes. I have.

Q. Extensively?

A. Very extensively.

Q. For a period covering many years?

A. Yes.

Q. Now, will you please answer the question?

Mr. Hahlo: I renew my objection; exception.

A. In consequence of these sales, the owners of the property had to cancel the certificates of sale, and they found, and I found
87 in dealing with improvement certificates and certificates of sale, that it was more advantageous to the owner to purchase by assignment the certificates of sale and turn the certificates of sale over to the City Treasurer in cancellation of said certificates of sale. Consequently, the demand and call for improvement certificates

themselves began to drop off and drop off almost immediately, so that for many years I had virtually no call for the improvement certificates and purchased the certificates of sale.

Q. Do you know who conducted the assessment sales in 1888, 1892 and 1893?

A. The Treasurer and Receiver of Taxes in Long Island City.

Q. Do you know who this person was?

A. Frederick W. Bleekwenn.

Mr. Allen: I offer the witness for cross examination.

Mr. Hahlo: Without prejudicing the value of the testimony of Mr. Clay and waiving expressly the objection that Mr. Clay's testimony may not be considered because he was not cross examined, the Corporation Counsel defers for the present cross examination,

GEORGE E. CLAY.

Sworn to before me this 7th day of May, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, No. 37, Kings County.

Certificate filed in Kings County Register's Office No. 4936, New York County's Clerk's Office, No. 19. And New York County Register's Office No. 4087.

88 CHARLES BENNER, being duly sworn, testified as follows:

By Mr. Allen:

Q. Do you know Mr. Elias C. Benedict, the complainant in this action?

A. Yes, I have known him for many years.

Q. Have you in the past represented Mr. Benedict in a legal capacity?

A. I have.

Q. Did you ever represent him with reference to the presentation to the City of New York of a claim of Mr. Benedict on account of Long Island City improvement certificates?

A. I did.

Q. Did you ever present to, and file with the Comptroller of the City of New York on behalf of Mr. Benedict a petition looking toward the payment of these certificates?

A. I have, on behalf of Mr. Benedict and others named in the petition.

Q. I show you a paper entitled, "Matter of the Application of Elias C. Benedict and others for Compromise of Certain Claims Arising from Evidences of Indebtedness, under Chapter 686 of the Laws of 1904" which is endorsed "Original filed with Comptroller February 21, 1905," and ask you whether or not the original was filed with the Comptroller of New York City?

Objected to by Mr. Hahlo as incompetent, irrelevant and immaterial; exception.

Q. I will qualify that question by asking whether you know whether the original was filed with the Comptroller of New York City?

Objection renewed.

A. I do.

Q. Was it filed?

A. It was filed.

Q. Is this paper that I show you a correct copy of the original filed?

89 Mr. Hahlo: I have no objection to letting that go in at this time subject to correction if it requires correction, except that I do object on the ground that it is incompetent, irrelevant and immaterial; exception. I have no objection because a copy is produced, but I do object because it is incompetent, irrelevant and immaterial; exception.

A. That is a copy. It was filed February 21, 1905, with the Comptroller.

Mr. Allen: I offer a copy of that petition in evidence.

Received in evidence and marked Complainant's Exhibit "A."

Mr. Hahlo: I object on the ground that it is incompetent, irrelevant and immaterial and of no probative force and on the further ground that an offer or petition to compromise is not admissible; exception.

Q. Do you know Mr. Charles Wanninger, the Executor of the estate of William Nelson?

A. I do.

Q. Did you at any time present a petition on behalf of Mr. Wanninger, as Executor, to the Comptroller of New York City looking toward the compromise of certain claims arising from evidences of indebtedness under Chapter 326 of the Laws of 1874?

Objected to by Mr. Hahlo on the ground that it is incompetent, irrelevant and immaterial, that an offer to compromise is under no circumstances competent testimony; exception.

A. Yes, a petition for the settlement of the claims.

90 Q. I show you a paper entitled "Matter of the Application of Charles Wanninger and others for Compromise of Certain Claims Arising from Evidences of Indebtedness, under Chapter 686 of the Laws of 1904," and ask you if the original of this paper was filed with the Assistant Deputy Comptroller of the City of New York as appears by the endorsement on the back?

Same objection; exception.

Mr. Hahlo: We reserve the right to introduce the original in the event that we find the copy is not correct.

A. It was, on May 14, 1906.

Mr. Allen: I offer it in evidence.

Received in evidence and marked Plaintiff's Exhibit "B."

Q. Were either of these petitions ever rejected or the claims refuted by the City after their filing by you? That is, are these claims still pending before the City of New York?

Mr. Hahlo: I object to that. It is asking for a legal conclusion. Further, it is incompetent, irrelevant and immaterial. You cannot prove petitions to compromise by way of evidence and furthermore the question calls for a conclusion of the witness. Exception.

A. It is still pending so far as I know and the City has taken no action on them.

Q. You have never been notified then, I assume, that these claims have been rejected?

Same objection; exception.

A. No. On the contrary, on quite a number of occasions I have had interviews with Mr. Sterling with reference to these 91 petitions and he has told me that he had not yet taken them up or come to any conclusion about them, and, as he expressed it, he didn't want to disturb a sleeping lion. Mr. Sterling is Assistant Corporation Counsel.

Mr. Hahlo: I move to strike out the answer to the last question, and in particular so much of it as relates to statements of Mr. Sterling, upon the ground that such statements are not binding upon the defendant; exception.

Q. Then, as I understand, you are still waiting to hear from the Corporation Counsel?

A. Yes, sir. He has told us repeatedly that he would take the matter up and render an opinion.

Q. Were you instrumental on Mr. Benedict's behalf in having any legislation passed looking to the payment of these First Ward Improvement Certificates in 1904 or thereabouts?

A. I had several conferences with several attorneys whose clients were interested in these certificates and we drafted a bill, and I think there were some conferences with one Assistant Corporation Counsel and I also had one conference with Mr. Sterling and I think the result was that the City drafted a bill which was passed in 1904 with reference to the adjustment of some of the old assessments.

Q. These services that you speak of were rendered then in 1904 and prior to 1904?

A. Yes. I think we had a bill up for three different sessions for the adjustment of these old assessments and other matters.

Q. Do you recall when these bills were up? How long before 1904?

A. I think they were the year immediately preceding. 92 My recollection is that for two sessions prior to 1904, we had attempted to get a bill passed.

Mr. Allen: I offer Mr. Benner for cross examination.

By Mr. Hahlo:

Q. When you advocated the passage of these bills which finally eventuated in the Act of 1904, you had doubts, did you not, of the rights of Mr. Benedict to collect upon these improvement certificates?

A. No, I always thought it a good, legal and equitable claim, but we thought if we could get some commission to deal with this as a jury, it would be a more expeditious way than litigation, and that we might by that means get some compromise and settlement.

Q. But the purpose of the bill so far as you were concerned was to compromise or settle?

A. Yes.

CHARLES BENNER.

Sworn to before me this 16th day of July, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, No. 37, Kings County.

Certificate filed in Kings County. Register's Office No. 4936. New York County Clerk's Office No. 19. And New York County Register's Office No. 4087.

MR. CLAY recalled,

By Mr. Allen:

Q. Whenever property was sold at an assessment sale by the City Treasurer and Receiver of Taxes and was bought in by some
93 third person and paid for in improvement certificates, do you know whether or not any entry or endorsement was made upon the certificate of sale issued to the purchaser in connection with the assessment?

Mr. Hahlo: Objected to as incompetent, irrelevant and immaterial and not binding upon the City; it is not the best evidence; exception.

A. Yes, I have seen a number of entries on the backs of the certificates of sale as having been cancelled on such and such a date.

Q. Was it customary for the Treasurer or Receiver of Taxes to make such entries upon such sales?

Mr. Hahlo: I object. The witness is not in a position to testify and the testimony is not binding on the City; exception.

A. I have seen such entries on quite a number of certificates of sale.

GEORGE E. CLAY.

Sworn to before me this 7th day of May, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, No. 37, Kings County.

Certificate filed in Kings County. Register's Office No. 4936. New York County Clerk's Office No. 19. And New York County Register's Office No. 4087.

On consent, examination adjourned to the 9th day of May, 1913, at 2 P. M.

94 Examination further adjourned, on the 9th day of May, 1913, to the 16th day of May, 1913, at 2 P. M.

Examination further adjourned, on the 16th day of May, 1913, to the 23rd day of May, 1913, at 2 P. M.

Examination further adjourned, on the 23rd day of May, 1913, to the 26th day of May, 1913, at 2 P. M.

Examination further adjourned, on the 26th day of May, 1913, to the 2nd day of June, 1913, at 2 P. M.

Examination further adjourned, on the 2nd day of June, 1913, to the 9th day of June, 1913, at 2 P. M.

Examination further adjourned, on the 9th day of June, 1913, to the 16th day of June, 1913, at 2 P. M.

Examination further adjourned, on the 16th day of June, 1913, to the 19th day of June, 1913, at 2 P. M.

95 Examination continued, June 19, 1913, at 2 P. M.

Appearances:

The Complainant, Elias C. Benedict, by Allen & Chard, Solicitors, Charles K. Allen, Esq., of Counsel.

The Defendant, The City of New York, by Corporation Counsel, George P. Nicholson, Esq., of Counsel.

Mr. Allen: I offer in evidence the certificates of indebtedness that are marked for identification, it being understood that the plaintiff is not obligated to prove the signatures of the parties signing and countersigning these certificates, it being admitted, subject to correction, that these signatures are genuine. If the Corporation Counsel subsequently ascertains that these signatures, or any of them, are not genuine, the plaintiff is to be obligated to prove the genuineness of such certificates as he so finds.

It is stipulated that the persons who signed as Commissioners were, at the time that they signed these certificates, Commissioners. This stipulation is subject to correction.

It is further stipulated that the persons who countersigned these certificates, at the time that they were countersigned, held the offices they purported to hold. This is also subject to the same correction as the above.

Mr. Nicholson: I object to the evidence as incompetent, irrelevant and immaterial, and on the further ground that it is not binding upon the City of New York, the defendant in this case. This objection does not cover the objection as to the genuineness of the signatures; exception.

Mr. Allen: The envelope is marked instead of the certificates themselves for the purpose of convenience.

Received in evidence and marked Plaintiff's Exhibit "C."

Mr. Allen: I offer in evidence letter of Allen & Chard and Leon Abbott, dated March 19, 1910, addressed and mailed to the Comptroller of the City of New York. There is no objection made to the copy being put in evidence as the original is in the possession of the Comptroller.

Mr. Nicholson: This is subject to correction and objected to as incompetent, irrelevant and immaterial and not binding upon the City of New York; exception.

Received in evidence and marked Plaintiff's Exhibit "D."

Mr. Allen: I offer in evidence letter of Allen & Chard, dated April 26, 1910, to the Hon. Douglas Mathewson, Deputy Comptroller of the City of New York.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding on the City and on the further ground that it is a self-serving declaration and not good evidence; exception.

Received in evidence and marked Plaintiff's Exhibit "E."

Mr. Allen: Also letter of Allen & Chard, of May 3, 1910, to Hon. William A. Prendergast, Comptroller of the City of New York.

Same objection; exception.

97 Received in evidence and marked Plaintiff's Exhibit "F."

Mr. Allen: I offer in evidence letters of May 10th and May 24th, 1910, by Allen & Chard to Hon. Douglas Mathewson, Deputy Comptroller of the City of New York, and letter of June 20, 1910, of Allen & Chard to Hon. William A. Prendergast, Comptroller.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibits "G," "H," and "I" respectively.

CHARLES K. ALLEN, being duly sworn, testified as follows:

Mr. Allen: My name is Charles K. Allen. I am an attorney at law and was in 1910, a member of the firm of Allen & Chard, Solicitors for the complainant in this proceeding. I state that at the times above mentioned, that is the times the above letters purport to have been written, I personally dictated the said letters to the persons mentioned and caused the same to be stamped and mailed in an envelope addressed to said persons at the addresses mentioned in said letters and caused said letters to be mailed. I state that the general course of business in my office was that all letters dictated were put in a basket for mailing after they were stamped and that I followed the usual course in regard to these letters.

Mr. Nicholson: The above testimony is given subject to the objection that it is incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

98 Mr. Allen: I further testify that I received from the Department of Finance of the City of New York, under date of April 28, 1910, a letter addressed to Allen & Chard and signed by E. D. Fisher, Deputy Comptroller. I produce, and offer in evidence said letter.

Same objection; exception.

Same received and marked Plaintiff's Exhibit "J."

Mr. Allen: I make the same statement in regard to a letter dated May 27, 1910, signed by D. Mathewson, Comptroller of the City of New York, and offer this in evidence.

Same objection; exception. There is no objection raised that these are not the genuine signatures.

Same received in evidence and marked Plaintiff's Exhibit "K."

Mr. Allen: I make the same statement in regard to a letter dated June 23, 1910, addressed to Allen & Chard and signed by Hon. William A. Prendergast, Comptroller. I offer this in evidence.

Same objection; exception.

Same received in evidence and marked Plaintiff's Exhibit "L."

CHAS. K. ALLEN.

Sworn to before me this 25th day of June, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, Kings County, No. 37.

Certificate filed in Kings County Register's office No. 4936. New York County Clerk's office No. 19, and New York County Register's office No. 4087.

99 CHRISTIAN REHMKE, being duly sworn, testified as follows:

By Mr. Allen:

Q. Please state your name and residence?

A. Christian Rehmke, 25 East 133rd Street, Borough of Manhattan, New York City.

Q. Have you made any searches during the past few months in the books of the office of the Collector of Assessments and Arrears in Long Island City?

A. I have.

Q. Have you examined the tax sales books in that office?

A. Yes, sir.

Q. Have you a list of the books that you examined?

A. Yes, I made out a list.

Q. Is this the list that I show you?

A. Yes.

Q. Is that list correct?

A. Yes, it is in my own handwriting.

Mr. Allen: I offer that in evidence.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

Same received in evidence and marked Plaintiff's Exhibit "M."

Q. State, if you can from your examination of said books, what books cover the tax sales in 1886 and state the taxes for what years were covered by these sales. Have you prepared such a list?

A. Yes.

Q. Have you it with you?

A. Yes.

Q. Is this list which you show me a correct list?

A. That is a correct list.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "N."

100 Q. Did you prepare a list showing the tax sales made in 1886 by the Receiver of Taxes and Assessments of Long Island City to private individuals?

A. I did.

Q. Have you this list with you?

A. Yes.

Q. Is it in your own handwriting?

A. It is.

Q. Is this list correct?

A. It is correct.

Mr. Allen: I offer this list in evidence subject to the stipulation with regard to the correctness.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant.

Received in evidence and marked Plaintiff's Exhibit "O."

Q. Does this list contain a correct statement taken from the books you have heretofore mentioned as examining, and does it show all the tax sales in 1886 as appears by said books?

Same objection; exception.

A. All the sales. That is correct.

Q. That is, these figures are just as they appear in the books?

Same objection; exception.

A. Just as they appear in the books.

Q. I ask you to explain this list to me. In looking at it I notice that the first column is marked "ward," the second "block," the third "lot," the fourth "sale," the next "sold to," the next "sold for" and the next "arrears," and I ask you to explain what each of these headings means.

Same objection; exception.

A. That means where the lot is situated, in which ward,
101 in what block, and the time when the sale was made and also
the block and lot number and also who it was sold to, what
it was sold for and the arrears at the time of the sale—the amount
due at the time of the sale.

Q. Have you prepared an analysis of the figures shown on the
list just marked in evidence that shows what number of parcels sold
were sold for less than the amount of the tax and which were sold
for more?

Same objection; exception.

A. Yes.

Q. Show us your analysis.

Same objection; exception.

Mr. Allen: I offer in evidence this analysis and ask you if it is
correct?

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "P."

A. That is correct.

Q. Can you tell me from your examination of said books what
parcels, if any, were bought in by the City of Long Island City at
the tax sales held by the Receiver of Taxes in 1886?

Same objection; exception.

A. Yes.

Q. Is this list that you produce a correct list?

A. Yes.

Q. And does it show all parcels bought in by Long Island City
at the said tax sale in 1886?

Same objection; exception.

A. Yes.

Mr. Allen: I offer this in evidence subject to correction by the
defendant.

Same objection; exception.

102 Received in evidence and marked Plaintiff's Exhibit "Q."

Q. Is this list just offered in evidence in your own handwriting?

A. It is.

Q. I ask you to explain this list to me. In looking at it, I notice
the first column is marked "ward," the second "lot," the third
"block," the fourth "amount due," and the next "amount sold for."
What do these headings mean?

Same objection; exception.

A. They mean the property was sold, in which ward, what block,
what number of lot and the amount sold for and the amount due at
the time of the sale.

Q. Have you prepared an analysis of this schedule showing the

number of parcels sold for less than the amount of the tax and the number that were sold for more?

Same objection; exception.

A. Yes.

Q. Is this list that you show me an analysis of the schedule just offered in evidence?

A. Yes.

Q. Did you prepare this analysis yourself?

A. I did.

Q. In your opinion is it correct?

A. It is correct.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "R."

Q. State, if you can, from your examination of the books what books covered the tax sales held in Long Island City in 1888 and state the taxes for what years were covered by this sale, giving the numbers of the tax books and what years were covered thereby. Have you prepared a list?

Same objection; exception.

A. Yes.

Q. Was this list you show me prepared by yourself?

A. Yes, sir.

Q. In your opinion, does it correctly cover the matters that it purports to cover?

A. It does.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "S."

Q. Can you tell the unpaid taxes for what years were covered by the sale of 1888 from your examination of the books? This answer is subject to correction?

A. Yes.

Q. What years?

A. It is my memory from about 1870 to 1883.

Q. Can you tell me what tax sales were made to private individuals by the Receiver of Taxes of Long Island City in 1888 and have you prepared such a list?

A. I have.

Q. Is this list that you show me the list that you prepared and is it in your own handwriting?

A. It is.

Q. Does this list in your opinion correctly set forth all of the sales made by the said City Treasurer in 1888 to private individuals?

A. Yes, sir.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "T."

Q. I ask you to explain this list to me. The first column
104 is marked "ward," the second "block," the third "lot," the
fourth "sale," the fifth "sold to," the next "sold for" and
the last "arrears."

Same objection; exception.

A. They mean the property sold, the ward, the number of the
block, number of lot, in what year it was sold and to whom it was
sold, the amount sold for and the arrears due at the time of the sale.

Q. Have you prepared an analysis of this list just offered in
evidence?

A. Yes, sir.

Q. Is this list which you give me such an analysis?

A. That is a correct analysis.

Q. In your opinion, does it correctly set forth an analysis of the
list last offered in evidence?

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "U."

Q. Can you tell from your examination of the books you have
testified you did examine, what tax sales were made by the City
Treasurer and Receiver of Taxes of Long Island City in 1888 were
bought in by Long Island City?

A. Yes.

Q. Have you prepared a list showing the parcels bought in by
said City?

A. Yes.

Q. Is this list that you give to me a correct list, and is it in your
own handwriting?

A. Yes, it is.

Q. I notice the last two pages are in typewriting—you except
those from your answer as to handwriting?

A. Yes, sir.

Mr. Allen: I offer this in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "V."

105 Q. I ask you to explain this list to me. I notice the first
column is marked "ward," the second "block," the third
"lot," the fourth "amount due" and the last "amount sold for."

Same objection; exception.

A. It means the property sold at that time, the ward, block num-
ber, lot number, the amount due at the time of the sale and the
amount it was sold for.

Q. Have you prepared an analysis of the figures shown on the list just offered in evidence?

A. Yes.

Q. Is this analysis that you submit to me in your opinion a correct analysis of the list last offered in evidence?

A. Yes, sir.

Mr. Allen: I offer the analysis in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "W."

Q. Can you state, from your examination of the tax books which you state you have examined, what books covered the tax sale held in Long Island City in 1890? Have you prepared a list showing these?

A. Yes.

Q. Is this list that you submit to me a correct list in your opinion?

A. It is.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "X."

Q. Does this list last offered in evidence in your opinion give the correct number of the tax books and the years and property covered by each book?

106 Same objection. Objection on the further ground that the question calls for a conclusion; exception.

A. Yes.

Q. Can you tell me from your examination of the tax books what sales were made to private individuals by the City Treasurer and Receiver of Taxes of Long Island City in 1890?

A. Yes.

Q. Have you prepared a list of them?

A. Yes.

Q. Is it in your own handwriting and is it correct?

Same objection; exception.

A. It is.

Mr. Allen: I offer it in evidence.

Mr. Nicholson: I object to it as incompetent, irrelevant and immaterial and not binding upon this defendant; exception.

Received in evidence and marked Plaintiff's Exhibit "Y."

Q. I ask you to explain this list to me. I notice that the first three columns are marked "ward," "lot" and "block," the next "sale," the next "sold to," the next "sold for" and the last "arrears."

Same objection; exception.

A. It means the property sold at that time, the number of the ward, number of block, number of lot, date of sale, that is the year

of the sale, to whom it was sold, for what it was sold, and the amount of the arrears due at the time of the sale.

Q. Have you prepared analysis of this list just offered in evidence?

A. Yes, sir.

107 Q. And is this paper which you submit to me a correct analysis of this list?

Same objection; exception.

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "Z."

Mr. Nicholson: It is not the intention of the Corporation Counsel to object for the reason that the books of Long Island City with reference to taxation have not been produced. And the objection of the Corporation Counsel to the analysis is not intended to object to the point that the witness should have read the separate items on each list.

By Mr. Allen:

Q. Can you tell from the examination of the books which you state you examined, what parcels were bought in by the City of Long Island City in 1890 upon the tax sales by the Receiver of Taxes and the Treasurer of Long Island City?

A. Yes.

Q. Is this list in your own handwriting?

A. Yes.

Q. Is it a correct list?

Same objection; exception.

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "AA."

108 Q. Have you prepared an analysis of the list last shown in evidence?

A. Yes.

Q. Is this analysis that you show to me in your opinion a correct analysis of that list?

A. It is.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "BB."

Q. Can you tell me what years were covered by the tax sale at Long Island City in 1892, and in what tax books reports of said sales appear?

Same objection; exception.

A. Yes.

Q. Is this list you show me a correct list?

A. It is.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "CC."

Q. Can you tell me from the examination of said taxbooks what tax sales were made to private individuals by the Receiver of Taxes and the Treasurer of Long Island City in 1892?

Same objection; exception.

A. Yes.

Q. Is this list that you submit to me a correct list and in your own handwriting?

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "DD."

109 Q. Have you prepared an analysis of this list which has just been offered in evidence?

A. Yes, sir.

Q. Is this list a correct analysis, in your opinion?

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "EE."

Q. From your examination of the tax books which you have testified you examined, can you state what parcels were sold by the Receiver of Taxes and Treasurer of Long Island City in 1892? and were bought in by Long Island City?

Same objection; exception.

A. Yes.

Q. Is this a correct list taken from the books?

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "FF."

Q. Have you prepared an analysis of the figures shown on the list just offered in evidence?

Same objection; exception.

A. Yes.

Q. Is this list which you submit to me in your opinion a correct analysis of the list *that* last offered in evidence?

Same objection; exception.

A. Yes.

Mr. Allen: I offer it in evidence.

Same objection; exception.

110 Received in evidence and marked Plaintiff's Exhibit "GG."

Q. Have you made an examination of the assessment ledgers covering the assessment sales made on the first and second ward properties in Long Island City in the years 1889 and 1892?

Same objection; exception.

A. Yes, sir.

Q. Can you give the numbers of the books that you examined?

Same objection; exception.

A. Yes. Assessment ledgers, Improvement District in Long Island City, numbered 1, 2, 3 and 4.

Q. Where were these assessment ledgers and sales certificate books kept?

Same objection; exception.

A. In the vault. In the office of the Tax Collector of Assessments and Arrears in Long Island City.

Q. Can you tell me what assessment sales of lots were made in Long Island City in 1889 and 1892, covering property in the first ward in Long Island City? I refer to the sales of property for non-payment of assessments provided for by Chapter 326 of the Laws of 1874.

A. Yes, sir.

Q. Have you prepared a list showing the said assessment sales, where the property was located at the time of the sale, the owner of record of the property, to whom sold, the amount of the assessment, balance due on the date of sale, amount sold for, &c.?

A. Yes, sir.

Q. Are these lists which you submit to me numbered 1 to 60 inclusive in your own handwriting?

A. Yes, sir.

111 Q. Are these lists copies of the assessment ledgers and the improvement sales certificates books which you have testified you examined and do they purport correctly to state the time of the sale, to whom sold, &c.?

Same objection; exception.

A. Yes.

Mr. Allen: I offer these lists, numbered 1 to 60 inclusive, in evi-

dence and I suggest that the Commissioner mark page 60 to cover all of the pages.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "III."

Q. Are the contents of these lists just offered in evidence just as they appear on the assessment ledgers and certificates sales books?

A. Yes.

Q. In looking at page 1, I notice that the first two columns are marked "date of sale," the third "ward," the fourth "sub-district," the fifth "lot number," the sixth "owner of record," the seventh "sold to," the eighth, "amount of assessment," the ninth, "balance due on date of sale," the tenth, "sold for," the eleventh, "interest," the twelfth "overbid," the thirteenth, "underbid," the fourteenth "redeemed," the fifteenth, "amount redeemed for," and ask you to explain the meaning of these.

Same objection; exception.

A. It means that the property sold, what the date of sale, ward number, sub-district number, lot number, the owner of record at the time of sale, to whom sold, the amount of assessment, balance due on date of sale, the amount sold for, interest due at that time, 112 the amount overbid, the amount underbid, redeemed at what date and the amount redeemed for.

Q. Have you prepared an analysis or recapitulation of the amounts of the overbids and underbids as compared with the amounts of the assessments plus the interest due on the dates of the assessment sales covered by these list which analysis is taken from these lists?

Same objection; exception.

A. Yes.

Q. Is this analysis which you submit in your own handwriting and prepared by you?

A. Yes, sir.

Mr. Allen: I offer it in evidence.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "II."

Q. Is this analysis in your opinion correct?

Same objection; exception.

A. It is.

Q. Can you state from the analysis the total amount of overbids on the assessment sale of 1888 and 1889?

A. Yes; overbid \$2,426.42.

Q. Can you from this analysis give the total amount of underbids?

A. Yes, \$10,879.69.

Q. From this analysis, can you give me the number of lots sold in 1888 and 1889?

A. Six hundred and eleven.

Q. Can you give me the total amount of overbids on the assessment sales in 1892?

A. \$62.69.

Q. Can you give the total amount of underbids in the assessment sales in 1892?

A. \$2,111,279.25.

Q. How many lots were sold at the assessment sale in 1892?

A. Two thousand and eleven.

13 Q. I understand from your analysis that in 1892 the total amount of all overbids was \$62.69 and the total amount of underbids \$2,111,279.25.

A. Yes.

Q. Can you tell from your examination of the assessment sale books and the certificate books that you have testified that you examined, whether any entry was made on the books when property was redeemed. That is, does any entry appear on those books in connection with any cases?

Same objection; exception.

A. On the tax sales books, it was marked across "redeemed" and that date and year.

Q. Does this apply to all redemptions?

A. Not to all of them.

Q. To most of them?

A. No, not most of them. To some of them.

Q. Was there any book which you saw in the office of the Collector showing the amounts redeemed for and the nature of redemption?

Same objection; exception.

A. Only a small book; yes.

Q. And what did that book show in regard to redemption? That is, what entry was made?

Same objection; exception.

A. The entry was made—the date and year it was redeemed, the amount and how it was redeemed, in certificates or cash.

CHRISTIAN REHMKE.

Sworn to before me this 11th day of July, 1913.

BARKER D. LEICH,

[SEAL.] Notary Public, No. 37, Kings County.

14 Certificate filed in Kings County Register's office, No. 4983, New York County Clerk's office No. 19; and New York County Register's office No. 4087.

It is stipulated by both parties that the above questions put to Christian Rehmke are subject to the objection of the defendant on the ground that they are incompetent, irrelevant and immaterial and not binding upon this defendant, no objection being made that the original records were not produced.

Mr. Allen: I offer Mr. Rehmke for cross examination, and also Mr. Benedict and Mr. Clay at such time as suits the convenience of the Corporation Counsel, the Commissioner and myself, as well as the witnesses.

Mr. Allen: I offer in evidence a copy of an order of the Hon. Charles L. Benedict, United States District Judge in the case of Elias C. Benedict against Frederick W. Bleckwenn, as Treasurer of Long Island City, dated June 30, 1893. This document I offer is a copy of a certified copy.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding on the City, and on the further ground that it is not within the issues in this case. No objection is made that the original is not produced unless it later develops that this is not a correct copy of the order.

Received in evidence and marked Plaintiff's Exhibit "JJ."

On consent, examination adjourned to June 26, 1913, at 2.30 P. M.

115 Examination continued at the office of the Commissioner, on the 26th day of June, 1913, at 2.30 P. M.

Mr. Allen: I offer in evidence extracts from minute books of the First Ward Long Island City Commission, which books are on file in the office of the Deputy City Clerk in the County Court House, Borough of Queens, City of New York, the volumes being numbered 1, 2 and 3, it being stipulated that the same are offered in evidence subject to defendant's objection that they are incompetent, irrelevant and immaterial and that they are not binding upon the City of New York, and with the reservation to the defendant of the right to verify the accuracy of the same and make any corrections, if any appear to be incorrect, and the further reservation of the defendant of the right to offer in evidence any other entries in said books.

Mr. Nicholson: The objection of the defendant is not intended to raise the point that the books themselves are not offered in evidence. I object, however, upon the ground that it is incompetent, irrelevant and immaterial and not binding upon this defendant and on the further ground that it is not within the issues in this action; exception.

Received in evidence and marked Plaintiff's Exhibit "HH."

Mr. Allen: I offer in evidence a statement taken from the First Ward Long Island City Improvement Certificate book, filed in the office of the Deputy City Clerk, in the Borough of Queens, 116 County Court House, New York City, of certificates of the denominations of \$500 and \$1,000, issued to Farwell-Sage & Co., as well as statement of requisitions signed by the Commission upon the City Treasurer for the issuance of improvement certificates

which is taken from the book of requisitions filed in the office of said Deputy City Clerk. These statements are offered in evidence subject to the same objection as indicated by the City in connection with the papers last offered in evidence but no objection is made that the original books are not produced.

Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "LL."

HENRY S. KEARNY, being duly sworn, testified as follows:

By Mr. Allen:

Q. What is your business and residence?

A. My residence at present is Lakewood, N. J., and I am President of several real estate corporations and looking after my own affairs.

Q. Were you one of the contractors or sub-contractors for First Ward, Long Island City improvement work done in 1874?

Same objection; exception.

A. I was a partner of Farwell-Sage & Co. and as contractor on part of the work, I built some bridges across the railroad tracks, under separate contracts with the Commission.

Q. Were Farwell-Sage & Co. contractors of any of the work done by the Commission?

Same objection; exception.

117 A. Farwell-Sage & Co. were the principal contractors for the removal of dirt from Thompson Hill and filling in said dirt to grade some of the streets of Long Island City.

Q. Do you know whether or not they were paid for the work done in improvement certificates?

Same objection; objection on the further ground that the question calls for a conclusion; exception.

A. I do.

Q. State whether they were paid for in certificates or not.

Same objection; exception.

A. They were paid in certificates only—certificates of improvement.

Q. Do you know whether anyone by the name of James Thompson had any connection with the improvement work in any way?

Objected to as leading; exception.

A. Yes.

Q. State what connection Mr. Thompson had.

Mr. Nicholson: I object on the ground that it is incompetent, irrelevant and immaterial and not binding upon this defendant. Exception,

A. Mr. Thompson was the owner of property on the hill in Long Island City where the dirt was taken from and said dirt was paid for to Thompson.

Q. Did you have any dealings, at or about the time that you were engaged in this improvement work, in the improvement certificates by buying or selling, or otherwise dealing with them?

118 Mr. Nicholson: Objection on the ground that it is incompetent, irrelevant and immaterial, and not binding upon this defendant and is not within the issues. Exception.

A. Yes.

Q. Did you trade in these certificates to any extent?

Same objection; exception.

A. Yes.

Q. Are you familiar with the market value of these certificates up to 1892?

Same objection; exception.

A. Somewhat.

Q. In your opinion, what were these improvement certificates worth before the assessment sale in 1892 in the market?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon the defendant, and on the further ground that the question calls for a conclusion and the question is not in proper form, and on the further ground that a proper basis has not been established for the question. Exception.

A. Approximately sixty cents on the dollar. Sixty to ninety cents.

Q. Was the market value more or less than that before the time that you mentioned?

Same objection. Objection on the further ground that no market is established for these. Exception.

A. Before the sale they were worth more than after the sale.

Q. Was the market value before the sale more than it was after the sale?

119 Mr. Nicholson: Objected to as calling for a conclusion—a proper basis has not been laid. Exception.

A. It was more before the sale.

Q. What are these certificates worth now?

Mr. Nicholson: I object to that as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. I do not know of any sale in the last year or two.

Q. So far as you know, then, they haven't any market value?

Mr. Nicholson: Same objection and the further objection that the question is leading. Exception.

A. I do not know of any market value that they have.

Q. Have you kept in touch with the market for these certificates since the time of the sale in 1892?

Objection on the ground that it is incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. I have tried to.

Q. Do you remember selling any improvement certificates in 1892 or about then?

Same objection; exception.

A. I suppose I have dealt in considerably over a million dollars of them?

Q. Can you give me an idea of what you received for these certificates before the sale, as well as what you received afterward?

120 Same objection; exception; objection on the further ground that the question is not in proper form. Exception.

A. Yes.

Q. Please do so.

Mr. Nicholson: I object on the ground that it is incompetent, irrelevant and immaterial and not binding on this defendant. Exception.

A. I have dealt in certificates from ninety cents on the dollar before the sale down to fifteen cents on the dollar after the sale.

Q. Do you know whether the City of Long Island City did redeem about 1896, any certificates of sale from you?

Same objection; exception.

A. Yes.

Q. Was there any such redemption made, and if so, give the amount of the certificates sold that were redeemed and the amount that you received.

Same objection; exception.

A. The Treasurer of Long Island City bought from me certificates of sale to redeem the water works—a part of the water system of Long Island City—the First Ward pumping station, you might say, for about \$2,000, for cash what was assessed for over \$3,000 of improvement.

Mr. Allen: I offer the witness for cross examination.

Mr. Nicholson: No cross examination.

HENRY S. KEARNY.

Sworn to before me this 11th day of July, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, No. 37, Kings County.

121 Certificate filed in Kings County Register's Office No. 4936, New York County Clerk's Office No. 19, and New York County Register's Office No. 4087.

CHARLES WANNINGER, being duly sworn, testified as follows:

By Mr. Allen:

Q. Where do you reside and what is your business?

A. I reside at No. 114 East 19th Street, Borough of Manhattan, City of New York. I am Executor and Trustee of the Estate of William Nelson, deceased; managing Trustee.

Q. Do you know Mr. Benedict, the plaintiff?

A. I do.

Q. How long have you known him?

A. More than thirty-five years.

Q. Did you ever at any time have any conversation with Mr. Benedict in regard to your looking after his interests in connection with the improvement certificates of Long Island City?

A. I have, yes.

Q. State briefly what he requested you to do, if anything, and about how long ago it was that you had this talk with him.

Mr. Nicholson: I object to the question as incompetent, irrelevant and immaterial, and on the ground that it is self-serving; on the further ground that any conversations had between Mr. Benedict and Mr. Wanninger are not competent evidence to bind this defendant. Exception.

A. I had continuous talks since 1889. He told me to take full and entire charge of his matters in Long Island City.

122 Q. During the times that you say that you had charge of the matter for Mr. Benedict, were you also representing Mr. William Nelson?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. Yes.

Q. Mr. Nelson is now dead, is he not?

Same objection; exception.

A. Yes.

Q. Were you present at the assessment sales held in Long Island City by the City Treasurer of Long Island City in 1892?

Same objection; exception.

A. Yes, I was.

Q. Was anyone present with you at that time?

Same objection; exception.

A. William Nelson.

Q. That is the same Mr. Nelson you have just referred to?

Same objection; exception.

A. Yes.

Q. Did either you or Mr. Nelson have any conversation with the

City Treasurer during the time that the sale was being conducted or just before?

A. Yes.

Q. Please state any conversation you had with Frederick W. Bleckwenn, the City Treasurer, or that Mr. Nelson had with him in your presence.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial; on the further ground that any conversation had between

Mr. Wanninger and Mr. Bleckwenn, as Treasurer of Long Island City, is not binding upon this defendant, and on the further ground that any conversation had between Mr. Nelson and the Treasurer of Long Island City, Mr. Bleckwenn, is not binding upon this defendant. Exception.

By Mr. Allen:

Q. Before you answer this question, state whether or not this conversation was had with Mr. Bleckwenn at the time he was conducting the assessment sale.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. Yes. I objected on the way he was conducting the sale, selling the property for less than the amount of the assessment and the accrued interest.

Q. Did you or Mr. Nelson make any other statement or objection to the Treasurer?

Same objection; exception.

A. We said that he was receiving improvement certificates in payment for less than the amount of the assessment and accrued interest, contrary to the sales conducted theretofore.

Q. I understand, then, you and Mr. Nelson protested to the Treasurer of Long Island City against his selling the lots on the assessment sales for less than the amount of the assessment and interest.

Same objection; exception.

A. Yes, and also that a person going in there and paying cash and having no certificates, was placed on the same basis as a person who would buy the lots in improvement certificates—that the money had no more value than the improvement certificates because the improvement certificates were worth less than the money on the average.

Q. About when did you and Mr. Nelson have this conversation with the City Treasurer?

Same objection; exception.

A. March 15th or 16th, 1892.

Q. Did you show to the City Treasurer the notice contained in

the document which I submit to you, which is marked "List of the several parcels of Real Estate to be sold at Public Auction for the unpaid Assessments in and adjoining the First Ward of Long Island City, at the office of the Treasurer and Receiver of Taxes, in the City Hall, Long Island City, at 10 o'clock A. M., on Tuesday, March 15th, 1892, pursuant to Chapter 326, of the Laws of 1874, and the several acts supplementary thereto, and Chapter 656 of the Laws of 1886?"

Same objection; exception.

A. Yes, I did.

Q. What part of the notice on the cover of this document, if any, did you call to the attention of the City Treasurer and what, if anything, did you say to him?

Same objection; exception.

A. I told him he was not selling the property in the same manner and form that he was selling property for unpaid taxes and water rates; that if the property did not bring the amount due thereon, the City should not slaughter the property as it was doing at the present time.

Mr. Allen: I ask to have the inside of the cover marked for identification, and ask the Commissioner to copy it in evidence.

Same objection; exception.

125 Received in evidence and marked Plaintiff's Exhibit "MM," which reads as follows:

"Notice"

Is hereby given that the undersigned will sell the several parcels of Real Estate situate in Long Island City, at Public Auction, for the unpaid Assessments for the Improvements in and adjoining the First Ward of Long Island City, at 10 o'clock A. M., on Tuesday, March 15th, 1892, at the office of the Treasurer and Receiver of Taxes, in the City Hall, Long Island City, pursuant to Chapter 326 of the Laws of 1874, and the several Acts supplementary thereto, and Chapter 656 of the Laws of 1886, for the lowest term of years for which any purchaser will take the same and pay the aggregate amount due thereon, or if no person shall so offer to purchase, then in fee simple to the highest bidder. A list of said Real Estate is open for inspection at my office, during office hours, and will be furnished to applicants therefor free of all costs or charge."

Section 12 of said last mentioned Act provides as follows:

"All sales of real estate for such unpaid taxes, assessments, water rates and rents for any year shall be subject to the unpaid taxes, assessments, water rates and rents of subsequent years, to all prior sales for unpaid taxes, assessments, water rates and rents, and to all assessments not then due.

"Dated, Long Island City, January 12th, 1892.

"FREDERICK W. BLECKWENN,
"Treasurer and Receiver of Taxes."

126 Q. What, if anything, did the City Treasurer say to these conversations that you and Mr. Nelson had with him?

Same objection; exception.

A. He said he was going right on with the sale and he was going to sell the property.

Q. Did he say anything about his intention to receive improvement certificates?

Same objection; exception.

A. Yes.

Q. What did he say?

Same objection; exception.

A. He said he would receive improvement certificates in payment of the assessments. He would try to sell the property. First he read that notice of sale—Complainant's Exhibit "MM,"—and said that he would sell the property for assessments and receive the improvement certificates in payment of any and all bids; that he would try to sell it for years and if he could not sell it for years he would sell it in fee.

Q. At this sale, were lots bought in payments made by the purchasers in improvement certificates?

Same objection; exception.

A. Yes.

Q. Do you know whether or not the improvement certificates were received at par?

Same objection; exception.

A. At par and accrued interest.

Q. Do you remember a lot that was put up for sale upon which there was an assessment of \$1,560.25, and upon which a bid 127 was made in cash? Do you remember what action was taken by the City Treasurer in connection with this lot?

Same objection, and further objection that the question is leading. Exception.

A. Yes, it was the third lot offered for sale.

Q. What happened?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. Mr. Nelson bid \$300 in cash and he said to Mr. Bleckwenn, the City Treasurer, he would sell improvement certificates at thirty cents on the dollar and Mr. Bleckwenn accepted a bid of \$400 in improvement certificates for the property.

Q. That is, I understand, Mr. Bleckwenn did not accept Mr. Nelson's bid of \$300 in cash?

Same objection; exception.

A. No.

Q. Although, as I understand from you, Mr. Nelson offered to sell improvement certificates for thirty cents on the dollar.

Same objection; objection on the further ground that it calls for a repetition of testimony already given. Exception.

A. Yes.

Q. Did you hear any conversation with the City Treasurer in regard to his allowing redemption?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. He said that the property bought in at this sale might be paid for in improvement certificates for the amount it was sold for.
128 Q. At the time of this sale in 1892, do you know how much was due on the lots covered by the Act of 1874?

Same objection; exception.

A. Yes.

Q. Please state what the amount was?

Same objection; exception.

A. \$1,760,000.

Q. Can you state, answering this question yes or no, what was the general average of the sales made to purchasers at this assessment sale. I mean by general average, the proportion that the amount bid by them bore to the assessment with interest.

Same objection; exception.

A. Yes.

Q. Please state it.

Same objection; exception.

A. When the sale took place after October 24, 1892, the property brought from two to forty per cent. of the assessment.

Q. Can you state, after this sale of 1892, was completed, whether there were any improvement certificates outstanding?

Same objection; exception.

A. There were.

Q. Approximately how much?

Same objection; exception.

A. About \$300,000.

Q. Is Mr. Bleekwenn, formerly City Treasurer, alive?

A. He is not.

129 Q. Do you know whether or not the property sold at these assessment sales is now worth more than it was at that time, or less?

Same objection; further objection that it calls for a conclusion; exception.

A. Yes.

Q. Has it increased considerably in value?

Same objection; exception.

A. It has.

Q. Have you dealt in real estate in Long Island City and are you familiar with the values of real estate there?

A. I have, somewhat.

Q. Do you know whether or not there is any market now for the improvement certificates that are still outstanding?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant; exception.

A. Yes.

Q. Is there?

Same objection; exception.

A. There is not.

Q. Does the Estate that you represent own such certificates?

Same objection; exception; objection on the further ground that the question calls for a conclusion. Exception.

A. They do.

Q. On account of the estate that you represent owning certificates, have you endeavored to keep in touch with the market in regard to these certificates?

Mr. Nicholson: Objected to as leading; exception.

130 A. I have.

Q. Is the City of New York allowing redemption by former owners of land sold in 1892?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial, as leading and calling for a conclusion and on the further ground that it is not binding upon this defendant. Exception.

A. Yes.

Q. Do you know any redemption taking place in 1907?

Same objection; exception.

A. Yes.

Q. Tell us about that.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant; exception.

A. Three lots bought by James Davren, the owner E. W. Paige, being known as Sub-district 61, Lots 19, 2 and 1 in the First Ward

of Long Island City; date of sale, March 16, 1892; the first lot was sold for \$300; the next lot for \$300; and the next lot for \$1,000.

Q. How about the redemption?

Objected to on same grounds; exception.

A. Redeemed, September 23, 1907, by certificates of the First Ward improvement, by certificate numbered 277 of \$1,000, interest on same, \$2,131.83, amounting to \$3,131.83, and by another certificate numbered 642 of \$1,000, interest on same \$1,703.50, totaling \$2,703.50. Amount paid in for the redemption of the above property \$5,835.33. The certificates were assigned to Elias C. Benedict by James Daveran.

131 Q. By whom was that redemption made, by Mr. Benedict?

Same objection; exception.

A. The redemption was made by E. W. Paige to the City of New York.

Q. Did Mr. Benedict receive any certificates?

Same objection; exception.

A. I refused to receive the redemption for Mr. Benedict.

Q. You refused to receive the certificates upon redemption?

Same objection; exception.

A. Yes.

Q. Do you know of any redemption in 1899?

Same objection; exception.

A. Yes; number of Certificate 109; bought by Elias C. Benedict at the sale; owner, Trustees of Union College; for \$334.07; property being known as Subdistrict 48, lot 28, First Ward, January 2, 1899. Redeemed by certificates July 13, 1899, for \$843.20 in improvement certificates.

Q. Was this redemption accepted by Mr. Benedict, or by you for him?

Same objection; exception.

A. I did not accept it for him.

Q. Who offered these certificates to Mr. Benedict for redemption?

Same objection; exception.

A. Mr. Mahoney, Collector of Assessments and Arrears of New York City.

Q. Do you know whether or not the City of New York has allowed a redemption since 1899?

132 Same objection; exception.

A. Yes.

Q. Tell us about any redemption that you know which took place subsequent to 1899.

Same objection; exception.

A. I received on behalf of the estate of William Nelson a redemption of lot known as No. 19, Subdistrict 18, Long Island City. I received \$590.71 in cash.

Q. From whom did you receive this redemption?

Objection renewed; exception.

A. From the Bureau of Collection of Assessments and Arrears.

Q. When was that?

A. After May 27, 1905.

Q. Do you know of any redemption that has taken place this year?

Same objection; exception.

A. Yes.

Q. Tell us about that.

Same objection; exception.

A. June 17, 1913, I received in redemption of Lot 5, Subdistrict 43 of the First Ward, redeemed April 28, 1894, sold for unpaid assessments January 4, 1889, I received \$104.78 in cash and one improvement certificate for \$20, dated November 5, 1877, in the name of Farwell, Sage & Co.

Q. From whom did you receive this cash and certificate?

Same objection; exception.

A. From the Bureau of Assessments and Arrears in Long Island City.

133 Q. Did you purchase from Mr. Bleckwenn, the Treasurer of Long Island City in October, 1892, any lands at the assessment sales, and if so, state, if you can, the amount that you paid for these lots, the amount of the assessments on the same and what part that you paid was paid in improvement certificates?

Same objection; exception.

A. I bought about forty lots; the amount of the assessment with accrued interest due on the property at the time of the sale was \$55,203.01. I bought that property at the sale for \$35,690.23.

Q. What did you make payment in?

Objection renewed; exception.

A. I made payment in the First Ward Improvement Certificates. The amount of the certificates par value was \$17,040. The interest on same amounted to \$18,925.44, totaling \$35,965.44, being an overplus of \$275.21.

Q. To recur to the sale in 1892, did the City Treasurer make any announcement at the time he started the sale in regard to the man-

ner in which he intended to conduct the sale, and, if so, state what the announcement was?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. On the further ground that any acts of the Treasurer would not be the acts of the City of New York. Exception.

A. He announced that the lots would be sold for non-payment of assessments to the highest bidders unless he could first get a bid to lease the same for a term of years, and that he would receive in payment for such assessments what were known as Long Island 134 City improvement certificates, and that such lots could be redeemed by delinquent owners in the same kind of certificates.

Q. Do you know whether or not this announcement which you state the City Treasurer made had any effect upon the bids?

Same objection; exception.

A. Yes.

Q. State the effect it had?

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

A. The property sold for less than the amount of the assessment and was really slaughtered.

Q. Why do you say the property was really slaughtered?

A. Because it was sold for from one-half to one-twentieth of the amount of the assessment due thereon.

Q. Was there much competition at this sale, in your opinion?

Same objection; exception.

A. There was not. Most of it sold on one bid.

Q. Did you have conversations with the different City Treasurers of Long Island City in regard to the matters you have testified to, after this sale?

A. I did.

Q. State how frequently you had these conversations and what they were?

Mr. Nicholson: Objected to on the ground that any conversation of this kind is not binding upon the City of New York. Exception.

By Mr. Allen:

135 Q. I qualify that question by asking you where the conversations were had with the City Treasurers and if they were during their office hours.

Same objection; exception.

A. Yes, at their office. I told them time and time again that the

property should not have been sold for less than the amount of the assessment and accrued interest.

Q. What did they say, if anything?

Same objection; exception.

A. They said they wanted to get rid of the whole thing. They wanted to sell it out.

Q. I show you what purports to be a letter press copy of a letter sent by Charles Wanninger and written to Frederick W. Bleckwenn, Collector and Receiver of Taxes, dated March 1, 1893, and ask you if you wrote that letter?

A. I did.

Q. Was this letter delivered to Mr. Bleckwenn?

A. Personally, by me.

Mr. Allen: I offer it in evidence and ask that it be copied into the record.

Mr. Nicholson: I object to it as incompetent, irrelevant and immaterial, and on the further ground that it is a self-serving declaration and not binding upon this defendant. Exception.

Received in evidence and marked Plaintiff's Exhibit "NN." Same reads as follows:

"NEW YORK, Mch. 1, 1893.

Mr. Frederick W. Bleckwenn, Treasurer and Receiver of Taxes, Long Island City, N. Y.

DEAR SIR: You are hereby notified that as to any and all of the lots purchased by me in sale on the 24th day of October, 136 1892, at the sale made by you for unpaid assessments in Long Island City, you are not to receive in redemption anything except lawful money of the United States, that in case you receive improvement certificates I will hold you personally responsible for any loss which may result to me from your so doing.

I furthermore notify you that, in case of a redemption being made upon any property which may have been sold by you in case for non-payment of an assessment, where the amount for which the sale was made was less than the amount due for the assessment and interest, you are not permitted to cancel the assessment upon your books; but that the amounts so paid for redemption, less the interest and expenses of the sale, is to be credited as a payment on the assessment, leaving the assessment still in force for the balance which may remain after such credit.

Respectfully yours,

CHAS. WANNINGER."

Q. I show you a letter dated March 28, 1893, addressed to Frederick W. Bleckwenn and ask you if you know whose handwriting this is in?

A. Mr. William Nelson's.

Q. You are familiar with his handwriting?

A. I am.

Q. Do you know whether the original of this letter was ever delivered to Mr. Bleckwenn?

A. It was.

Q. By whom?

A. By me.

Mr. Allen: I offer it in evidence.

Mr. Nicholson: I renew my objection. Exception.

137 Received in evidence and marked Plaintiff's Exhibit "OO."

Same reads as follows:

"NEW YORK, March 28/93.

DEAR SIR: I hereby notify you that should any party desire to redeem any lot, the fee of which was purchased by me at assessment sale held by you of lots in the 1st Ward of Long Island City, and should they pay you with 1st Ward Improvement Certificates of Long Island City, you are to immediately cancel and retire such certificates in accordance with the express requirements of the Law under which such certificates were issued; and I further notify you that I will not receive anything from you in settlement of my fee to lot or lots, other than the lawful money of the United States and I shall hold you accountable for any loss I may suffer by reason of your acting contrary to above notification.

WILLIAM NELSON.

F. W. Bleckwenn."

Q. I show you a paper numbered 169 purporting to be a certificate of sale for unpaid assessments for improvements in and adjoining the First Ward of Long Island City and ask you if you have ever seen that before?

A. Yes, I have seen that before.

Q. Is that the signature of Mr. Bleckwenn at the bottom?

A. It is.

Q. You are familiar with the signature?

A. Yes.

Q. Is that the form of certificate of sale used by Mr. Bleckwenn on the First Ward Long Island City assessment sales?

138 A. It is the same form except on the first sale it was numbered, on the second sale the same are not numbered, I believe.

Mr. Allen: I offer this in evidence as the form of certificate of sale issued to purchasers on the assessment sales.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

Received in evidence and marked Plaintiff's Exhibit "PP."

Q. I show you a deed dated April 28, 1891, purporting to be signed by Frederick W. Bleckwenn, and acknowledged by him

April 29, 1891, running to William Nelson, and ask you if you have ever seen this before.

Same objection; exception.

A. Yes.

Q. Is that the form of the deed executed by the City Treasurer and Receiver of Taxes to purchasers of land at assessment sales?

A. It is.

Mr. Allen: I offer it in evidence as the form of deed issued.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial and not binding upon this defendant. Exception.

Received in evidence and marked Plaintiff's Exhibit "QQ."

Q. I show you what purports to be a letter dated May 26, 1909, addressed to Herman Metz, Comptroller of the City of New York, and ask you if you ever saw the original of this letter?

A. I did.

Q. By whom was the original of this letter sent?

A. By Leon Abbott.

139 Q. To whom was the original delivered?

A. To the Hon. Herman Metz, Comptroller.

Q. Is this a correct copy of the original that was so delivered to Mr. Metz?

A. I believe it is.

Q. Were those pencil interlineations made in the original before it was delivered?

A. I believe they were.

Mr. Allen: I offer it in evidence.

Mr. Nicholson: Objected to as incompetent, irrelevant and immaterial, not binding upon this defendant, and on the further ground that it is a self-deserving declaration. Exception.

Received in evidence and marked Plaintiff's Exhibit "RR."

Q. Were you present when this letter was delivered to Mr. Metz?

A. I was.

Q. I show you a copy of a letter dated February 28, 1893, purporting to be signed by William Nelson, addressed to Frederick W. Bleckwenn, Treasurer and Receiver of Taxes of Long Island City, and ask you whether the original of this letter was delivered to Mr. Bleckwenn?

A. It was.

Q. By whom?

A. By myself.

Q. At his office?

A. At his office.

Q. Is this a correct copy of the original letter to the best of your belief?

A. It is.

Mr. Allen: I offer it in evidence.

Mr. Nicholson: Same objection; exception.

Received in evidence and marked Plaintiff's Exhibit "SS."

Mr. Allen: I file with the Commissioner a notice to produce dated June 20, 1913, served upon the corporation counsel on June 140 21, 1913, calling for the production of certain letters. I ask the corporation counsel to produce them.

Mr. Nicholson: I have not got them.

Mr. Allen: I then offer in evidence again these letters that were offered in evidence at last hearing.

Same objection; exception.

Exhibits of plaintiff lettered "D," "E," "F," "G," "H," "I," "J," "K," "L" again received in evidence.

Mr. Allen: The complainant rests his case and offers the witnesses for cross examination.

Mr. Nicholson: Cross examination deferred.

CHAS. WANNINGER.

Sworn to before me this 10th day of July, 1913.

[SEAL.]

BARKER D. LEICH,
Notary Public, Kings County, No. 37.

Certificate filed in Kings County Register's office No. 4936. New York County Clerk's office No. 19, and New York County Register's office No. 4987.

Examination adjourned, subject to call of the Commissioner.

Adjourned examination held at the office of Barker D. Leich, Esq., No. 55 John Street, Borough of Manhattan, City of New York.

Appearances:

Charles K. Allen, Esq., of Counsel for the Complainant.

Mr. Allen: I offer Mr. Christian Rehmke for cross examination.

141 In absence of counsel for the respondent, an adjournment was ordered by the Commissioner to the 30th day of October, 1913, at 2:30 P. M., for the cross examination of the remaining witnesses who have testified on behalf of the complainant.

Adjourned examination, held at the office of Barker D. Leich, Esq., No. 55 John Street, Borough of Manhattan, City of New York.

Appearances:

Charles K. Allen, Esq., of Counsel for Complainant.

George P. Nicholson, Esq., of Counsel for Defendant.

Mr. Allen: The complainant offers Mr. Charles Wanninger, Mr. George E. Clay, Mr. Henry S. Kearney and Mr. E. C. Benedict for cross examination.

Cross-examination of Mr. George E. Clay.

By Mr. Nicholson:

Q. Where do you live, Mr. Clay?

A. 167 Eleventh Street, Long Island City.

Q. What is your business?

A. Real estate.

Q. How long have you been in the real estate business?

A. About thirty years.

Q. Is that the only business you ever conducted?

A. No, I was a civil engineer up to the time I branched off into real estate.

Q. You stated on direct examination that you were at one time connected with the Long Island Improvement Commission, did you not?

A. Yes.

Q. Were you employed by that Commission?

A. Yes.

Q. In what capacity?

A. Assistant Engineer.

142 Q. What were your duties?

A. Field and office work.

Q. What kind of office work?

A. Drafting, estimating the calculations of the assessments and all matters pertaining to the engineering work.

Q. Engineering work?

A. Yes.

Q. Are you associated with Commodore Benedict in any way?

A. No.

Q. Were you at that time?

A. No, I have never been.

Q. Do you know a man named Purvis?

A. There was a man named Purvis used to be in Foster & Thomson office, attorneys; if that is the man, yes.

Q. Do you know whether he was connected with Commodore Benedict, the complainant in this action?

A. I do not. I would like to add that I did contracting work at one time.

Q. When did you do contracting work?

A. Just after I left the office of the First Ward Improvement Commission and when I was starting in the real estate business.

Q. Were you in the real estate business at the time you were an engineer?

A. No, I was in their employ only.

Mr. Nicholson: I ask for an adjournment and that these witnesses be subject to my subpoena for further cross examination, such cross examination to take effect at sufficient time prior to the beginning of the defendant's case in order that plaintiff's attorney may have a reasonable opportunity to rebut any testimony brought out on cross examination.

143 Q. Of course it is my right to get out a subpoena for you to appear on the adjourned day. Will you appear if you get a letter from me asking you to appear?

A. Why certainly.

GEORGE E. CLAY.

Sworn to before me this 6th day of July, 1914.

[SEAL.]

BARKER D. LEICH,

Notary Public, Kings County, No. 6.

Certificate filed in Kings County Register's office No. 6006. New York County Clerk's office No. 15, and New York County Register's office No. 6047.

Q. Is that the same with you, Mr. Wanninger?

A. Yes, sir.

CHARLES WANNINGER.

Sworn to before me this 2nd day of July, 1914.

[SEAL.]

BARKER D. LEICH,

Notary Public, Kings County, No. 6.

Certificate filed in Kings County, Register's office No. 6006. New York County Clerk's office No. 15, and New York County Register's office No. 6047.

Examination adjourned, on consent of both parties, to November 25, 1913, at 2:30 P. M., at the office of the Commissioner.

Examination adjourned from time to time on application of counsel for respondent, to the 1st day of July, 1914, at 2:30 P. M., at the office of the Commissioner.

144 Examination continued, pursuant to the foregoing, on the 1st day of July, 1914, at 2:30 P. M.

Same appearances.

It was stipulated between the attorneys for the respective parties that the persons who signed the certificates of indebtedness already offered in evidence, as Treasurer, were duly qualified Treasurers of Long Island City at the times that they signed the certificates in question.

HENRY S. KEARNY, being recalled by the complainant, testified as follows:

By Mr. Allen:

Q. You have heretofore testified in this proceeding?

Mr. Nicholson: Objected to as incompetent, irrelevant, immaterial and not binding on the defendant. Exception,

A. I think so. I have testified in a great many.

Q. You were connected with the First Ward, Long Island City, improvement work back in the late seventies and early eighties, weren't you?

Same objection; exception.

A. I was one of the contractors.

Q. For what?

Same objection; exception.

A. For grading and for building bridges over the Long Island Railroad, and paving.

Q. Will you state in general what the physical condition of the First Ward was before this improvement work was begun?

Same objection; exception.

145 A. It was largely a salt marsh that at most times of the day could not be walked on except in certain places flooded by high tides, with a very few streets and but a small area filled in so as to make it possible for habitation.

Q. Then, as a matter of fact, the greater part of the First Ward was unimproved property?

Same objection; exception.

A. Yes.

Q. Can you approximate that percentage of the First Ward that you improved?

Same objection; exception.

A. We had a contract to fill in the streets of an area about one mile by two miles square.

Q. Approximately what was the size of the First Ward in square miles?

Same objection; exception.

A. We had all of the First Ward and a part of the Second.

Q. Your contract then covered the improvement of all of the First Ward?

Same objection; exception.

A. Yes.

Q. In the improvement work done by your concern and other contractors, was the marsh filled in, streets laid out, sewer ing, guttering, paving and sidewalks constructed?

Same objection; exception.

A. Yes.

Q. In other words, swamp lands were redeemed?

Same objection; exception.

146 A. Streets were filled in, many of them paved, many of them sewer'd, bridges built, the streets were raised, we will say, from two feet elevation at the river to ten or fifteen feet as they went back from the river.

Q. Then before the work was begun, the land was not in such condition that it could be built upon?

Same objection; exception.

A. No, it couldn't be walked on. No, but little of it.

Q. I assume that this improvement work added materially to the value of the property.

Same objection; exception.

A. It made it possible to live there. We moved about two million yards of dirt from the hills that we filled into the streets. We paved from the Thirty-fourth Street Ferry out, I should say, more than a mile; two of the main streets were paved; one or two, if not more of the lateral streets parallel with the river. We built four or five bridges over the railroad track, having to raise the streets up so that they crossed over the Long Island Railroad tracks which required a clearance of about eighteen or nineteen feet.

Q. Under your contract, how was it provided that you were to be paid for the improvement work mentioned?

Same objection; exception.

A. We were to be paid by the certificates called "First Ward Improvement Certificates" issued by the Commissioners appointed for carrying out this improvement.

Q. You received no pay in cash?

Same objection; exception.

A. No pay in cash.

147 Q. The only compensation in cash that you got was what you could sell these certificates for?

Same objection; exception.

A. That is all.

HENRY S. KEARNY.

Sworn to before me this 2d day of July, 1914.

[SEAL.]

BARKER D. LEICH,
Notary Public, Kings County, No. 6.

Certificate filed in Kings County Register's office, No. 6006. New York County Clerk's office No. 15, and New York County Register's office, No. 6047.

Mr. Allen: Plaintiff offers the witness for cross examination.

CHRISTIAN REHMKE, recalled by complainant, testified as follows:

Q. You have heretofore testified in this action?

Same objection; exception.

A. I have, yes, sir.

Q. Since your last testimony have you made any examination of the tax assessment books of the late First Ward of Long Island City?

Same objection; exception.

A. I have.

Q. Those books are located in Municipal Building, in the tax office?

Same objection; exception.

A. Yes, in Long Island City.

Q. I show you a table of figures marked "First Ward" in 148 handwriting and ask you if this is in your handwriting?

Same objection; exception.

A. Yes, sir.

Q. Did you prepare this?

Same objection; exception.

A. Yes, sir.

Q. Are the matters contained on this paper taken from the tax assessment books?

Same objection; exception.

A. From the tax assessment books.

Q. Are the matters contained herein correctly taken from the said books?

Same objection; exception.

A. Yes.

Q. Were they abstracted by yourself from said books?

Same objection; exception.

A. Yes, sir, by myself.

Mr. Allen: I offer this in evidence.

Received in evidence and marked Plaintiff's Exhibit TT.

Q. Mr. Rehmke, this exhibit appears to be a comparison of the assessed valuations of one lot in each of the city blocks in the old First Ward for the years 1880 and 1908.

Same objection; exception.

A. That is correct.

Q. I ask you to explain a little more in detail. The first item

shows Sub-district 70, City Block 1, City Lot 1-11, assessed valuation, 1880, \$15,000; assessed valuation, 1908, \$210,000. Do I understand then, that the assessed valuation for 1880 for these lots was \$15,000 and for 1908, was \$210,000?

Same objection; exception.

A. Yes, sir.

Q. In Subdistrict 66, City Block 12, City Lot 3, the assessed valuation in 1880 is \$1,100, and in 1908 is \$195,000?

Same objection; exception.

A. That is correct.

Q. Do all of these figures shown on this exhibit with the exception of those marked "Improved Valuation, 1908," show the assessed value for unimproved property?

Same objection; exception.

A. Unimproved property, yes, sir.

Q. In preparing these items I notice you have taken one lot or parcel of land from each city block.

Same objection; exception.

A. Yes, sir.

Q. Did you take an average case from each block in making the comparison in question?

Same objection; exception.

A. That is right.

Q. In other words, you did not pick out in any of these cases any extreme illustration showing a greater difference between the valuation for the two years than was the average?

Same objection; exception.

A. No, sir.

Q. On the right side of this Exhibit are some figures 150 headed "Improved Valuation, 1908," did you take these figures from the tax assessment books?

Same objection; exception.

A. Yes, sir.

Q. And do they show the correct assessment of improved parcels of real estate for the blocks specified for the year 1908?

Same objection; exception.

A. Yes, sir.

Mr. Allen: I offer the witness for cross examination.

CHRISTIAN REHMKE.

Sworn to before me this 3rd day of July, 1914.

[SEAL.]

BARKER D. LEICH,
Notary Public No. 6, Kings County.

Certificate filed in Kings County Register's office No. 6006, New York County Clerk's office No. 45; and New York County Register's office No. 6047.

Plaintiff rests.

STATE OF NEW YORK,

County of New York,

Southern District of New York, ss:

I, Barker D. Leich, a Notary Public in and for the County and State of New York, with offices at No. 55 John Street, Borough of Manhattan, New York City, duly commissioned and qualified and authorized to administer oaths and to take and certify depositions, do hereby certify that pursuant to the order of Hon.

Learned Hand, U. S. Judge, made in the cause of Elias C. Benedict, complainant, against the City of New York, defendant, pending in the District Court of the United States, Southern District of New York, on the 24th day of March, 1913, I was attended at my office, No. 55 John Street, Borough of Manhattan, New York, by Charles K. Allen, Esq., counsel for said complainant, and by the Corporation Counsel of the City of New York, counsel for said defendant, upon the several days and dates heretofore stated; that the aforesaid witnesses mentioned whose testimony was taken, to wit, Elias C. Benedict, George E. Clay, Charles Benner, Charles K. Allen, Christian Rehmke, Henry S. Kearny and Charles Wanninger, are of sound mind and lawful age, and were by me first carefully examined and cautioned to testify to the truth, the whole truth and nothing but the truth; and that they and each of them thereupon testified as is heretofore shown and that the testimony by them subscribed and hereinbefore set forth was reduced to typewriting by me from the statements of said witnesses and was subscribed by said witnesses to the same in my presence, and was taken at No. 55 John Street, as above stated, and at the times as heretofore set forth, adjournments being had or taken from day to day as hereinbefore set forth. I further state that I am neither of counsel nor attorney for either of the parties to said cause or otherwise interested in the event of said cause in any way whatsoever.

Witness my hand and seal at the City and County of New York, in the Southern District of the State of New York, this 15th

152 day of September, 1914.

[SEAL.]

BARKER D. LEICH,
Notary Public, No. 6, Kings County.

Certificate filed in Kings County Register's office No. 6006, New York County Clerk's office No. 15; and New York County Register's office No. 6047.

PLAINTIFF'S EXHIBIT A.

Endorsed: "Original filed with Comptroller February 21st, 1905.
S. L. H. W. Jr."

In the Matter of the Application of ELIAS C. BENEDICT and Others,
for Compromise of Certain Claims Arising from Evidences of In-
debt edness, under Chapter 686 of the Laws of 1904.

To the Comptroller of the City of New York:

The petition of the undersigned respectfully shows: That peti-
tioners are the owners of or entitled to certain evidences of indebt-
edness of the City of Long Island City, now a part of the Borough of
Queens of the City of New York, known as "Improvement Certi-
ficates in Long Island City," a list of which certificates is set forth on
the schedule hereto annexed, marked "A," and which certificates
were issued by said Long Island City to pay for local improvements
under the provisions of Chapter 326 of the Laws of 1874,
153 known as the "First Ward Improvement Act," and which
certificates are in the following form:

\$20.	<i>Improvement Certificate.</i>	\$20.
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No. 2636.

State of New York, Long Island City.

November 3d, 1879.

This is to certify that J. R. Truax or bearer is entitled to Twenty
dollars with interest thereon at the rate of 7 per cent. per annum,
from the date hereof, payable out of the Improvement Fund in Long
Island City, established under Chapter 326 of the Laws of New York,
passed May 5th, 1874, entitled "An Act to provide for Improve-
ments in and adjoining the First Ward of Long Island City"; this
certificate being issued under the provisions of said act, and the said
amount of interest being payable as provided therein.

P. G. VAN ALST,
WM. BRIDGE,
H. S. ANABLE,
Commissioners.

\$20.
(Reverse.)

Countersigned:

JOHN M. MORRIS,
Treas. Long Island City.

This certificate is one of the Improvement Certificates in Long Island City, issued under the provisions of the act within mentioned. It draws interest at the rate of 7 per cent. per annum and is receivable at par and accrued interest at any time in payment of any assessment laid under said act and of the accrued interest on such assessment.

That by this last mentioned Act there was established a 154 Commission for the improvement of certain streets in the

First Ward of Long Island City, the expense of which was to be assessed upon the land adjacent to said improvements, and within certain districts to be prescribed by said Commissioners, and which assessments were to bear interest at the rate of ten (10) per cent. until paid.

That while these improvements were to be made under supervision of the Commissioners named, they were merely the agents for Long Island City for that purpose, and the language of the Act in many places proves that it was a city work.

That, for example, in Section 2 of the Act, (Chapter 326, Laws of 1874), it is provided that no improvement shall be made until the title to the street shall be acquired by the City, and to the Commissioners are delegated (Sec. 10) the powers of the Common Council to acquire title to streets for the city.

That it is also provided (Sec. 9) that the Treasurer of the city shall countersign all certificates issued for payment of work and shall keep a record thereof; that payment of the assessments (Sec. 6) shall be made to him, and (Sec. 13) he and his sureties shall be liable on his official bond for the faithful discharge of his duties.

That it is also provided (Sec. 4), that the Assessors of Long Island City shall assess equitably the property benefitted, shall give notice, hold meetings, hear objections and correct and certify the assessment roll and file such with the Treasurer.

That Section 9 of said Act also provided that in order to pay the expenses of said improvements, the Commissioners were authorized to issue as required certificates of indebtedness to be known as

155 "Improvement Certificates in Long Island City," which might be sold at par or paid at par to the contractors.

That said certificates should bear interest at 7 per cent. from their date, be payable to the party to whom issued or to bearer, and should pass by delivery and should also (Sec. 6) be receivable at par and interest as payment of any assessment levied under the Act.

That said certificates should be payable, with interest (Sec. 9), in the manner provided, out of any monies which should come into the hands of the Treasurer to the credit of said improvement fund and (Sec. 11), that upon the completion of the sales for non-payment of the assessments levied, "all the certificates shall be paid off," and that if there was any surplus to the credit of said fund it should be paid into the city treasury to defray taxes.

That there was thus clearly indicated the expectation and intention of the framers of the act that the certificates would and should be paid in full, and such would have been the case if the Treasurer

and other officials of Long Island City had properly performed their duties under the act, as hereinafter set forth.

That Section 5 of said act provided for the collection of said assessment as follows:

"No warrant shall be issued or required for the collection of any assessments under this act; nor shall any warrant be issued for any sale of lands for nonpayment of such assessments until ten years after the filing of such assessment roll; but all lots, pieces or parcels of land on which any assessment under this act shall remain unpaid on land after the day of the expiration of ten years after the filing of

the assessment roll, affecting the section of subdistrict in
156 which the lot is located, shall be advertised and sold for the

payment of such unpaid assessment; and such sale or sales shall be made by the Receiver of taxes or other officer then charged by law with the duty of selling lands in said city for nonpayment of city taxes and the proceedings for such sale, and such sale shall be the same and on the same notice and like terms; and said lots or parcels of land so sold may be redeemed, and in default of such redemption title thereto shall be given and perfected in the same manner, to the same extent, and with the same force and effect; and the costs, fees, charges and expenses of such sale shall be the same as shall then be prescribed by law for the sale of lands in said city for non-payment of city taxes, without further action or legislation on the part of the common council or any other body."

That under the provisions of this act certain streets in said Long Island City were improved between the years 1874 and 1882, which improvements were of material benefit to and aided greatly in the development of Long Island City.

That all of the assessment rolls for said improvements were filed, as required by said act, prior to the year 1882, and it therefore became the duty of the Treasurer of said city under the provisions of Section 5 of the said act to sell, at various times, on or before 1892, as the assessments fell due, all the lots on which any assessment remained unpaid, in manner, as then (1892) provided, for sales of lands for unpaid taxes in said City.

That at the time of the First Ward Improvement Act,
157 Chapter 326, Laws of 1874, was passed, May 5th, 1874, and up to and including the year 1886, the law providing for the sale of real estate for non-payment of taxes was laid down in Chapter 461 of the Laws of 1871, known as the Revised Charter of Long Island City.

That on June 15th, 1886, an act was passed known as Chapter 656 of the Laws of 1886, hereinafter called the "Tax Act," which provided a new method for the collection of taxes and assessments in said Long Island City.

That in the year 1892 the Treasurer of Long Island City proceeded to sell under the provisions of said Chapter 656 of the Laws of 1887 all those lots on which there remained unpaid assessments for said First Ward Improvement, and which act purported to repeal other acts inconsistent therewith. That by Section 3 of said Tax Act it was provided that the Treasurer of said City should publish

"a general notice that the several parcels of real estate upon which there are taxes or assessments or water rates or rents for which the sale is to be had will at a day specified in said notice, which shall be at the expiration of said six weeks, be sold at public auction for the lowest term of years for which any purchaser will take the same, and pay the aggregate amount due thereon; but if no person shall so offer to purchase, then in fee simple to the highest bidder at the City Hall in said City, to pay the taxes or assessments, water rates and rents, interest, percentage and expenses thereon which remain unpaid at the time of such sale," and that it shall further provide in Sec. 4, "that said Treasurer shall bid in in the name of the City, and for the use of the proper fund or account, all parcels of real estate at such sale, and to be sold for unpaid taxes, water rates and rents, which shall not be sold to any other person."

158 That, Sec. 6 also provided that "if the real estate shall sell for more than the amount of the taxes, or taxes and assessments, water rates and rents, interests, percentages and expenses aforesaid, the surplus shall be paid over by the said Treasurer to the County Court of Queens County," and that any person entitled thereto might then apply to the Court for distribution of the same.

That sec. 8 of said act provided that any person interested might redeem the lot from such sale "by paying the said Treasurer for the use of the purchaser upon such sale, his heirs and assigns, the sum mentioned in the certificate given to him, together with the interest upon the amount of taxes, assessments, water rates and rents, interest, percentage and expenses at the rate of 12% per annum."

Sec. 9 provided that if the lot was not redeemed the Treasurer should execute to the purchaser a lease, or if sold in fee a conveyance, of the real estate so sold, and that "thereupon the lien or liens for which the same shall have been so sold shall thereupon be cancelled." And that as to these lots which the Treasurer bid in for the City "the Common Council may direct a sale thereof at a price not less than the minimum fixed in their resolution." And that when said lot is so sold "all liens of said city thereupon for taxes, assessments, water rates or rents, for which the same shall have been sold, shall thereupon be cancelled of record by said Treasurer."

That it is clearly evident from these provisions that no lot upon which an assessment has been imposed should be sold for less than the full amount due thereon, and that in case no outsider, bid such amount, either, on a lease or in fee, it then became the duty of the

159 Treasurer to bid in the said lot for the city, for the amount of the assessment due, which amount would then be credited to the special First Ward Improvement Fund. The city would then own the lot, subject to redemption by the original owner for the full amount and 12% interest, but if he failed to redeem the City might sell through its Common Council the lot so purchased and thus recoup itself.

That contrary to the provisions of said act, and in violation thereof, the Treasurer of said City sold all the lots upon which assessments had been laid under said General Improvement Act to the highest bidder therefor, without reference to the amount of

assessments due thereon, and did not bid in the same for the said City for the whole amount due for such assessment with "interest, percentages and expenses."

That at the time such sales were held by said Treasurer, there was due for such assessments the sum of \$1,074,419.06, but that the land on which these assessments were a lien was sold by said Treasurer to the highest bidder in fee simple for the sum of \$484,500.57, leaving a deficit of \$589,918.49, which amount would have been amply large enough to have paid in full, with interest, the unredeemed certificates then outstanding, amounting to the sum of \$302,840, of which those shown in Schedule "A" hereto annexed are a part.

That it has long been a contention of petitioner and the other holders of the certificates enumerated in said Schedule "A," and who were original contractors who performed work and supplied materials for said improvements, that the acts of said Treasurer selling said assets at a sacrifice were illegal and unjust, and that they

160 have been prevented thereby to this day from obtaining the compensation for the work and materials to which they were justly entitled, and that they have both a legal and an equitable claim therefor against the City of New York, which succeeded to all the obligations of said Long Island City.

That since said sale and the deficiency in said Improvement Fund created thereby, the said certificates have been unsalable.

Petitioner further says that most of the territory covered by these attempted sales has remained unimproved for twenty years, and still remains so, owing to the fact that the questions relating to the assessment and sales therefor are unsettled. The owners have for the most part lost their property and have threatened law suits to test the validity of the various proceedings as soon as the land becomes valuable enough to make the contest worth undertaking. The purchasers under the tax sales have not improved the property purchased through fear that their titles would be disturbed by litigation in an effort by the certificate holders to set aside the sales, and this great territory, which is adjacent to 34th Street ferry, and which should have been the most rapidly improved and the busiest part of Long Island City, has lain dormant, and nothing but a payment and cancellation of the certificates now outstanding will definitely settle questions relating to these assessments and give this property the impetus it should long ago have had.

That it will be of Manifest advantage to the City to have these questions settled by purchasing the outstanding certificates, since the clearing up of the clouds on these titles will so rapidly improve the assessible value of this property that the City will be very soon reimbursed for any outlay it may have to make under this commission.

161 That under the provisions of Chapter 686 of the Laws of 1904, the Comptroller of the City of New York, acting under the written advice of the Corporation Counsel, is empowered to compromise and settle said claims arising from said evidences of indebtedness issued on account of local improvements upon such

terms as may be agreed upon with persons interested therein, and to purchase upon such terms as may be agreed upon, said evidences of indebtedness issued to obtain money with which to constitute local improvements.

Petitioner further shows, on information and belief, that the total face value of First Ward Improvement Certificates now outstanding is about \$200,000. which with accrued interest amounts to about \$350,000.

Petitioner further shows that the face value of the certificate set forth in Schedule A, hereto annexed, is \$137,760, on which there is interest due at 7% from the several dates of issue to the date of this petition, amounting to about \$131,000, making altogether the sum of \$268,760.

That if said Comptroller, empowered as aforesaid, will purchase the certificates mentioned in Schedule "A" hereto annexed, at their face value and five per cent interest thereon from the date thereof respectively, instead of at seven per cent as upon the face thereof, your petitioner will sell the same on those terms.

Your petitioner therefore prays that at this late day a tardy justice may be done the holders of these certificates by the payment for the work and materials furnished by them for such improvements,

and that their said claims may be settled and said certificates
162 purchased by said Comptroller on said terms of par and five per cent. interest from dates of issue.

Dated, February 17th, 1905.

CHARLES BENNER,
Attorney for E. C. Benedict,
100 Broadway, Borough of Manhattan, City of New York.

PLAINTIFF'S EXHIBIT C.

A copy of these certificates is annexed to complaint as Exhibit "B." These certificates were all issued before June 9, 1879, and amounted par value to \$8,000.

PLAINTIFF'S EXHIBIT D.

Endorsed on original paper: "Plaintiff's Exhibit D, Barker D. Leich, Commissioner."

March 19, 1910.

Hon. William A. Prendergast, Comptroller of the City of New York,
280 Broadway, New York City.

DEAR SIR: On behalf of our client, Mr. Elias C. Benedict, the owner of \$8500, par value of certificates issued under Chapter 326 of the Laws of 1874, commonly known as First Ward Long Island City Improvement Certificates, we respectfully call your attention to the following facts connected with the issuance of the same:

The statute above referred to provided for certain improvement work in the First Ward of Long Island City to be done by contract,

163 payment to be made to the contractors by the issuance of assessment certificates payable out of assessments to be levied by Commissioners appointed under the Act. This Act also provided that the assessments levied were to remain liens until the full amount of the assessments, with interest, was paid; that liens were created upon the lands for the payment of the assessments; that upon non-payment of the assessments, with interest, in full after the expiration of a certain period, the City Treasurer and Receiver of Taxes of Long Island City should conduct a sale of the lands in the same manner as tax sales in said City were conducted, said certificates to be payable out of the sums so received.

The said Act also provided for the appointment of Commissioners by the Mayor of the City in the event of vacancies existing in the Commissions.

The commissioners appointed by the Act in question caused assessments to be levied, contracts were made and assessment certificates issued to the contractors. Two vacancies occurred in the Board and the Mayor of the City of Long Island filled said vacancies, so that at the time our client obtained his certificates the Board was composed of two commissioners appointed by the Mayor, who signed said certificates.

Our client advanced large sums of money to Messrs. Farwell, Sage & Company, contractors, receiving in payment from the contractors the said assessment certificates, which he still owns.

Subsequently thereto an Act was passed by the Legislature known as Chapter 501 of the Laws of 1879, which among other things provided that upon any sales of said lands for the nonpayment of assessments the said assessment certificates would be used by the purchaser in payment, which right did not exist under the Act of

1874, or at the time our client acquired his certificates. Subsequently thereto, under Chapter 656 of the Laws of 1886, the City Treasurer and Receiver of Taxes of Long Island City sold at two sales a large number of parcels of said lands for nonpayment of assessments, receiving, over protest, in every case assessment certificates in payment, but refusing, in spite of objection, to make said sales for money; and also upon the second sale sold said properties for less than the amount of the assessments with interest, receiving in payment said certificates amounting in part value to less than said amounts.

As a result of the foregoing Acts of the City of Long Island through its officials, the same clearly being unlawful and illegal so far as vested rights accruing prior to 1879 are concerned, the possibility of the creation, establishment and maintenance of any fund out of which the assessment certificates were to be paid became frustrated, and contractors and others who had either done this improvement work or advanced funds for said purposes were unable to collect on said certificates at all, except in certain instances through some of them being able to sell the same for less than their face value to prospective purchasers at said sales.

As a result of said sale so conducted the following condition of affairs arose: A property owner whose land was sold for non-

payment of assessments and who had no right to redeem without the payment of the assessments with interest in full, acquired the right, upon such sale, to redeem from any one who had purchased said lands, for less than the amount of the assessment, using certificates (amounting in par value to less than the amount of the assessment) in payment, to compel said purchaser to reconvey to the former owner the said lands then sold, upon the latter delivering to the purchaser certificates (which he had acquired for much less than par) in equal amount to the certificates issued in purchase. Thus the former owner received a reconveyance of the land free and clear of the assessment, with an expenditure of a mere fraction of the amount of the assessment, and the contractor who had looked to the existence of an assessment fund was defrauded.

In addition thereto and as a result of the foregoing, the only possible value that the other outstanding certificates had was through their possible use to purchasers at tax sales, that is, in disposing of the same to prospective purchasers, or to the former land owners to be used upon redemption; all of which could only be done upon said certificates being sold for only a slight percentage of their face value. In short, the contractors, including our client, who had performed this work and in good faith lived up to their contracts, or advanced monies in expectation of the creation of a fund out of which said certificates were to be paid, found that they had become diverted by this gross ease of deception and fraud perpetrated by the City of Long Island through its officials.

Under the Law of 1886, the City Treasurer and Receiver of Taxes, perhaps assuming that said Act of 1879, was constitutional, sold said lands as above pointed out, upon the non-payment of assessments, over the protests of numerous certificate holders, not only for less than the amount of the assessments, but receiving in every instance in payment therefor assessment certificates. Thus no fund was ever established for the payment of said certificates, although under the decisions of the courts, a trust duty on the part of the city, through its officials, existed to see that such trust fund (assessment fund) was created and the lien provided for by the statute preserved until the outstanding certificates were all paid.

166 It cannot be gainsaid, we respectfully submit, that any owner of certificates issued under the Act of 1874, prior to the passage of the Act of 1879 (our client's position) became possessed of vested rights in and to the creation and maintenance of said trust fund and preservation of said lien. Indubitably, a gross violation of a continuing trust duty, was committed by the City of Long Island, through its officials, and the certificate holders are now entitled to bring an action for damages or for an accounting and injunction, as they may deem desirable. Nor can it be said by any process of argument that the said claim is outlawed under the Statute of Limitations for continuing duties of such a nature are never outlawed.

At the time of the consolidation of the City of Long Island into the greater City of New York, all of the obligations and liabilities

of the former were adopted, acquired and assumed by the latter by express provision of the statute. This covered all existing claims of certificate holders against the City of Long Island for non-payment and non-performance of the City's trust duties. The condition of affairs thus existing at the time of the creation of the greater City of New York exists today and the present city is still liable we submit, not only legally and equitably, but in justice, good faith and conscience to compensate those who gave up their time, labor and money under contract for the betterment of the City.

This city cannot afford, we submit, to attempt even a repudiation of what are concededly its obligations, moral and equitable, as well as legal.

We now respectfully call your attention to the provisions of Chapter 601 of the laws of 1907, which provide in substance and effect that where the Comptroller of the City of New York 167 believes that for any reason a claim against the City is not valid legally, but in equity, justice and fairness the same should be paid, the City having been benefitted by the acts performed, and the claim is not barred by the Statute of Limitations, that the Comptroller has power to refer the same to the Board of Estimate and Apportionment for decision.

Although we submit that the claim of our client is a valid one legally against the city, yet even if such were not the case, we in all confidence insist that the same is one which should from every standpoint of honesty, fairness and morality be paid, as the City has been benefitted by the work done, and the claim is not outlawed by the statute, therefore falling fairly within the provisions of the Laws of 1907.

In view of the foregoing we respectfully ask that our client's claim be given by yourself the consideration and investigation which the same warrants, and that it be allowed against the City of New York as a valid and legal claim to be paid out of the funds in the City's treasury; but if you deem that the same should not be a valid claim, then, that you, under the provisions of the Laws of 1907, refer the said claim to the Board of Estimate and Apportionment for determination as therein provided, giving our client an opportunity to be heard before such Board, at which time we will, upon his behalf, submit in detail such a statement of facts and law as will convince the most skeptical that his claim should be allowed.

We of course are at your command, if you desire any additional information, and will be most pleased to submit to you, if you so desire, a brief on the facts and on the law.

We conclude with the hope that you will give this claim 168 your favorable consideration, which we know it merits, and trust that you will favor us with as speedy a determination as the duties of your office will warrant.

Closing with the statement that this letter is written without prejudice to our client's rights, we remain.

Respectfully yours,

(Sd.)

(Sd.)

C.K.A.—H.

ALLEN & CHARD,
LEON ABBETT.

STATE OF NEW YORK,
County of New York, ss:

Elias C. Benedict deposes and says: That he has read the foregoing document and knows the contents thereof, and that the same are true, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Sd.)

E. C. BENEDICT.

Sworn to before me this 14th day of April, 1910.

(Sd.)

JAMES J. CLARKE,
Notary Public, No. 155, Kings County.

Certificate filed in New York County, County Clerk's and Register's office.

[NOTARY SEAL.]

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PLAINTIFF'S EXHIBIT E.

April 26, 1910.

Hon. Douglas Mathewson, Deputy Comptroller of the City of New York, #280 Broadway, City.

DEAR SIR: Referring to the claim of our client, Mr. E. C. Benedict, of No. 80 Broadway, which our Mr. Allen left with you yesterday, we call your attention to the fact that the improvement work done in the First Ward, Long Island City, in connection with which our client's certificates were issued did of necessity benefit Long Island City and consequently the City of New York. Apart from the general benefits which the City must have received from the opening up of the new streets in the section of the city in question there is no doubt that abutting properties, as well as that in the neighborhood, was increased in value, so that the city derived therefrom increased taxation.

We make this statement to you apropos of our request in said claim that in the event it should be deemed that Mr. Benedict's claim was not a valid one legally, but was one which should be paid in equity and in good conscience, that the same be forwarded to the Board of Estimate and Apportionment, under the provision of the Act of the Legislature of 1907, referred to in said letter, and that we as attorneys for Mr. Benedict be given an opportunity of being heard in support of our claim at the hearing before the Board.

Yours very truly,

ALLEN & CHARD.

CKA-II

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PLAINTIFF'S EXHIBIT F.

May 3, 1910.

Hon. William A. Prendergast, Comptroller of the City of New York,
#280 Broadway, City.

DEAR SIR: In connection with our letter to you of March 19th, written on behalf of our client, Mr. Elias C. Benedict, demanding payment of certain First Ward, Long Island City, Improvement Certificates, issued under Chapter 326 of the Laws of 1874, the par value of which is \$8,000, we note that we did not in said letter specify the number of such certificates, which we do below.

We therefore on behalf of our said client, in demanding payment of said certificates, with interest thereon at the rate of 7% per annum from the date thereof, state that the dates, numbers and amounts of said certificates are as follows:

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Amount.	Issued in name of	No.	Date.
\$ 20.	Farwell, Sage & Co.	2326	Jan. 6, 1879
1000.	"	465	"
100.	"	2325	June 9, 1879
100.	"	2291	May 9, 1879
100.	"	2287	"
100.	"	2283	"
100.	"	2279	"
100.	"	2247	Apr. 7, 1879
100.	"	2164	Dec. 31, 1878
100.	"	2142	Dec. 9, 1878
100.	"	2140	Dec. 9, 1878
100.	"	2097	Nov. 7, 1878
100.	"	1956	Aug. 5, 1878
100.	"	1871	June 3, 1878
100.	"	1848	"
100.	"	1843	"
100.	"	1726	Apr. 1, 1878
100.	"	1455	Nov. 5, 1877
100.	"	1454	"
100.	"	1459	"
100.	"	1382	Oct. 1, 1877
100.	"	1378	"
500.	"	752	Nov. 7, 1878
500.	"	748	"
500.	"	739	Oct. 7, 1878
500.	"	717	Sept. 2, 1878
500.	"	721	"
500.	"	690	Aug. 5, 1878
500.	"	686	"
500.	"	702	"
500.	"	658	May 6, 1878
500.	"	652	"

Yours very truly,

ALLEN & CHARD.

CKA-H

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PLAINTIFF'S EXHIBIT II.

May 24, 1910.

Hon. Douglas Matthewson, Deputy Comptroller of the City of New York, No. 280 Broadway, New York City.

DEAR SIR: Referring to the matter of the claim of our client, Elias C. Benedict, against the City of New York, we call your attention to our last communication to you, dated May 10th, and ask if you will not kindly give the matter therein contained your consideration. We feel convinced that if you will re-examine the questions involved in said claim, in the light of our subsequent letter to you of May 10th, that you will perforce come to the conclusion that Mr. Benedict's claim is one of such a nature as should receive the approval of the City and be paid by it.

Kindly let us have the courtesy of as early a reply as your duties will permit.

Yours very truly,

ALLEN & CHARD.

CKA-H

PLAINTIFF'S EXHIBIT I.

June 20, 1910.

Hon. William A. Prendergast, Comptroller, of the City of New York, 280 Broadway, City.

DEAR SIR: On behalf of our client, Mr. Elias C. Benedict, of No. 80 Broadway, New York City, we hereby make demand upon

The City of New York for payment to him of the principal
173 and interest due upon certain Improvement Certificates
issued for Improvements in Long Island City under the provisions
of Chap. 326 of the Laws of 1874, the face value of which
is the sum of \$15,080.00, interest also being due thereon at the rate
of 7% from the date of the issuance thereof. The numbers, dates
and amounts of said certificates are set forth below, as well as the
name of the persons to whom they were issued.

Our reasons for asserting that the City of New York is liable for the payment thereof are set forth in our several letters to your department under dates of March 19th, April 26th, May 3rd and May 10th, to which we respectfully refer.

We would be very glad to take up this matter with you, or any representative of your Department, at any time that will meet with your convenience, and will be glad to give to you such other information as you may require.

Requesting that you give this matter your early and favorable attention, we remain,

Yours very truly,

ALLEN & CHARD.

CKA-H

NOTE—The certificates above referred to are as follows:

Amount.	Name.	No.	Date.
\$ 500	Farwell, Sage & Co.	936	Feb. 9, 1889
" "	.....	933	"
500	" "	890	Jan. 5, 1880
500	" "	863	Dec. 1, 1879
1000	" "	570	Feb. 9, 1880
1000	" "	561	Jan. 5, 1880
1000	W. T. Rosenkrans.....	651	Dec. 9, 1881
1000	"	653	"
1000	"	639	"
1000	"	632	"
1000	"	644	"
1000	"	645	"
500	Michael Kane.....	1074	Dec. 23, 1881
500	"	1077	"
500	"	1080	"
100	"	3261	"
100	"	3262	"
100	"	3263	"
100	"	3264	"
100	"	3258	"
20	W. & M. Baird.....	2955	June 7, 1880
20	"	2954	"
20	"	2924	May 10, 1880
20.	Farwell, Sage & Co.	2920	"
500	"	848	Nov. 3, 1879
500	"	837	Oct. 6, 1879
500	"	817	Aug. 4, 1879
500	"	892	Jan. 5, 1880
1000	"	559	Jan. 5, 1880
<hr/>			
\$15080			

\$15080

[Letterhead of]

City of New York

(Department of Finance.)

April 28, 1910.

Douglas Mathewson, Deputy Comptroller.

InReplying Refer to "LAW"

Messrs. Allen and Chard, 2 Rector Street, Borough of Manhattan.

My DEAR SIRS: I am in receipt of your communications of recent date, addressed to the Comptroller, in relation to the claim

of your client, Mr. E. C. Benedict of No. 80 Broadway, as to what are commonly known as "1st Ward Long Island City Improvement Certificates."

In reply thereto I beg to inform you that said matter will be investigated and you will be duly advised as to the final disposition thereof.

Respectfully,

E. W. FUTIG,
Deputy Comptroller.

C. S. W.
A. E. H.

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PLAINTIFF'S EXHIBIT K.

[Letterhead of]

City of New York

(Department of Finance.)

Douglas Mathewson, Deputy Comptroller.

May 27th, 1910.

Messrs. Allen & Chard, 2 Rector St., Manhattan.

GENTLEMEN: Acknowledging receipt of your communication of May 24, 1910, in reference to the claim of Elias C. Benedict on account of the First Ward, Long Island City Improvement certificates, I beg to inform you that it appears from the records of this Department that previous Comptrollers, pursuant to the advice of the Corporation Counsel, refused to consider these First Ward certificates for the purpose of adjustment, and the present Comptroller sees no reason for changing the course heretofore followed.

After careful consideration the claim is rejected.

Respectfully,

D. MATHEWSON,
Deputy Comptroller.

C. S. W.
A. E. H.

PLAINTIFF'S EXHIBIT L.

[Letterhead of]

City of New York

(Department of Finance.)

In replying Refer to —

June 23, 1910.

Messrs. Allen & Chard, No. 2 Rector Street, New York City.

GENTLEMEN: Permit me to acknowledge the receipt of your letter of June 20, 1910, in reference to the claim of Elias C. Benedict on account of First Ward, Long Island City Improvement Certificates, and in reply thereto to say that the letter of Deputy Comptroller Mathewson, of May 26, 1910, represents my conclusions on this subject. After careful consideration the claim has been rejected and I am satisfied that no useful purpose could now be served by reopening the matter.

Yours truly,

WM. A. PRENDERGAST,
Comptroller.

DM.

PLAINTIFF'S EXHIBIT N.

1886 Tax Sale.

The tax sale held in 1886 covered unpaid taxes and water rates and rents for the following years:

First Ward 1870-1883, Book one, block 15 to 116.

Second Ward; 1870-1883, block 6 to 276.

Third Ward, 1870-1883, Book one, block 6 to 38; and book two, block 38 to 170.

Fourth Ward, 1870-1883, Book one, block 7 to 258; Book two, block 11 to 205; Book 3, block 205 to 264.

Fifth Ward, 1870, 1873, Block 26 to 182.

PLAINTIFF'S EXHIBIT P.

*Tax Sales to Private Individuals of Long Island City Property—
Tax Sale in 1886.*

When analyzed this list shows the following results. 5 out of 639 parcels were sold for less than the amount of the tax. These are marked x on the statement.

In the cases where sales were made for less than the amount of the tax the tax and the receipts from sales of these five cases were as follows:

Tax.	Sale.
\$41.14	\$40.10
464.54	351.05
59.59	51.00
72.10	71.80
361.32	314.93

In this list 274 items out of 639 sold for amount of the assessment. The sale of the remaining parcels, that is, 360 sold for more than the amount of the tax.

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PLAINTIFF'S EXHIBIT R.

Tax Sale of First Ward, Long Island City Property, in 1886.

This list shows properties sold for taxes by the City for less than the amount of the taxes.

All items on this list were bid in by the City for less than the amount of the taxes. The City at this sale bid in no properties for the full amount or for more than the amount of the taxes.

This list shows 68 sales to the City.

PLAINTIFF'S EXHIBIT S.

1888 Tax Sale.

This tax sale covered unpaid taxes and water rates and rents for the following years:

First Ward, 1870-1885, Book one, block 19 to 110; Also block 16 to 64. Book two, block 64 to 116.

Second Ward, 1870-1885, Book one, block 149 to 171. Also block 6 to 167. Book two, block 167 to 277.

Third Ward, Book one, block 13 to 125; also block 6 to 59. Book 2, block 59 to 176.

Fourth Ward, 1870-1885, Book 1, block 3-252; Book 2, Block 3-69; Book 3, block 69-133; Book 4, block 133-223; Book 5, block 223-264.

Fifth Ward, 1870-1885, Book 1, block 38-177; also block 27-191.

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PLAINTIFF'S EXHIBIT U.

Tax Sale of First Ward, Long Island City Property Held In 1888.

This list shows sales made to individuals. 347 parcels of land were sold. 322 of the 347 were sold to individuals for the amount of the taxes and 12 were sold to individuals for less than the amount of the taxes. Those sold for less than the amount of the taxes are marked with an X.

Amount of tax.	Amount sold for.
\$299.94	\$150.00
30.07	10.00
30.12	5.00
239.92	40.00
479.79	200.00
757.46	751.00
284.91	100.00
57.14	5.00
180.73	171.73
42.61	36.97
65.00	63.00
5.40	5.35

PLAINTIFF'S EXHIBIT W.

Tax Sale of First Ward, Long Island City Property Held In 1888.

This list shows sales bid in by the City. 152 sales were made to the City. 147 of the 142 were sold for less than the amount of the tax. Five were sold for more than the amount of the tax. The five that sold for more than the amount of the tax were as follows: These are marked with an X.

Amount of tax.	Received from sale.
\$ 29.93	\$ 30.23
24.70	24.90
18.69	19.09
53.42	56.69
245.23	256.23

PLAINTIFF'S EXHIBIT X.

1890 Tax Sale.

This tax sale covered unpaid taxes and water rates and rents for the following years:

First Ward, 1870-1887, Book 1, block 27-81; also block 1-68; Book 2, block 69-116.

Second Ward, 1870-1887, Book 1, block 170-222; also block 6-167. Book 2, block 168-298.

Third Ward, 1870-1887, Book 1, block 7-109; also block 6-38. Book 2, block 39-83. Book 3, block 84-176.

Fourth Ward, 1870-1887, Book 1, block 45-252. Also block 2-38. Book 2, block 39-79. Book 3, block 80-200. Book 4, block 201-264.

Fifth Ward, 1870-1887, Book 1, block 38-154; also block 15-198.

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PLAINTIFF'S EXHIBIT

First Ward, Long Island City Sale

Sales made to individuals. No. of parcels sold for less than the amount of tax are marked X.

The parcels which sold for less than the amount of the tax are as follows:

Tax.	Amount sold for.
\$24.40	\$24.39
21.93	21.92
10.48	10.31
10.42	10.31
16 parcels taxed for:	
5.17 each	paid for.
4.89	5.01 each
	2.28 each

Those parcels which sold for more than the amount of tax are marked XX. They are as follows:

Tax.	Amount sold for.
\$10.01	\$10.11
7.69	7.69
10.01	10.01

The remaining parcels sold for

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PLAINTIFF'S EXHIBIT

First Ward Long Island City Tax

Properties bid in by the City at the tax

At this sale there were 80 pieces of property bid in by the City. Of these 80 pieces of property 61 were bought by the City for less than the amount of the tax, and 19 were bought by the City for more than the amount of the tax.

The cases where the City paid more than the amount of the tax are as follows: They are marked with an XX.

Amount of tax.	Amt. received at sale
\$ 277	278
15.58	15.61
12.61	12.67
21.01	21.01
10.20	10.22
4.36	4.38
2.73	2.82
4.36	4.38
4.36	4.38
11.42	13.14
15.05	18.13
4.49	12.55
4.49	12.55
41.32	43.90
137.17	140.48
198.90	212.08
278.29	434.50
278.29	491.79
40.99	75.95
35.70	35.73

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PLASTICS GROUP CO.

180 JOURNAL OF CLIMATE

Third Ward, 1870-1889, Book 1, block 14-231; also block 276
Book 2, block 77-176. Book 3, block 181-204.
Fourth Ward, 1870-1889, Book 1, block 14-231; also block 276
Book 2, block 77-176. Book 3, block 181-204.
Fifth Ward, 1870-1889, Book 1, Block 27-49; also block 15-198

PLAINTIFF'S EXHIBIT EE.

Tax Sale First Ward Long Island City Property in 1892.

This list shows sales to individuals.

99 parcels were sold, all of which were with one exception sold for the amount of the tax. In one case where the property was taxed for \$11.55 it was sold for \$14.10.

All of the remaining parcels were sold for the full amount of the tax.

PLAINTIFF'S EXHIBIT GG.

for Sale of First Ward Long Island City Property Held in 1897.

The following parcels were sold to the City at the tax sale—57 in number. Of these 57 parcels 20 sold for more than the amount of the tax, the excess being \$117.40.

They are as follows:

Amount of tax.	Amount sold for.	Expense
\$147.21	\$147.30	.00
20.81	20.82	.01
35.71	35.71	20.00
78.90	79.90	1.00
124.61	154.61	30.00
15.59	16.59	1.00
15.09	16.59	1.00
4.05	10.41	5.76
4.05	10.41	5.76
4.05	10.41	5.76
4.05	10.41	5.76
(3.83)	11.28	.45
9.10	9.10	.00
10.00	11.00	1.00
10.00	11.00	1.00
10.00	11.00	1.00
10.00	11.00	1.00
10.00	11.00	1.00

On the last odd day less than the amount of the tax are as follows:

Amount of tax.	Amount sold for.	Debit
124.54	124.14	.40
124.54	124.14	.40
124.54	124.14	.40
53.95	23.85	30.00
18.73	18.63	.10
18.73	18.63	.10
31.85	29.01	2.84
29.11	29.01	.10
27.97	27.07	.90
203.80	176.02	27.78
.65	4.71	.94
.55	.50	.05
9.91	7.96	1.96
6.94	4.71	2.23

Amount of tax.	Amount sold for.	Deficit.
8.04	6.76	4.23
1.01	1.13	.10
1.03	1.07	.04
5.03	5.07	.04
5.03	5.07	.04
5.03	5.05	.04
5.03	5.05	1.90
9.23	7.38	2.20
4.65	2.45	1.00
50.42	29.49	.90
19.35	18.45	.23
9.97	9.74	2.00
17.82	15.92	2.39
4.78	2.39	2.00
11.81	9.81	.01
3.05	3.04	1.00
54.02	53.02	1.00
54.02	53.02	1.00
54.02	53.02	.02
8.55	8.55	15.78
103.24	87.40	1.80
4.01	3.81	2.42
61.72	51.80	2.42
21.22	21.00	

T II.

*Underbid on the Amounts
of Sale as Extracted from*

Supplemental Direct Tax on Long Island City.

Year of sale.	Sheet No.	No. of lots.	Overbid. \$ e.	Underbid. \$ e.
1888/1889	1	43	67 74	.. ..
"	2	43	349 02	6786 23
"	3	44	.. ..	.. ..
"	4	44	684 59	4085 39
"	5	44	28 51	.. ..
"	6	44	.. ..	.. ..
"	7	44	.. ..	.. ..
"	8	44	.. 55	.. ..
"	9	44	93 73	.. ..
"	10	44	.. ..	.. ..
"	11	44	2 28	8 07
"	12	44	.. ..	.. ..

Year of sale.	Sheet. No.	No. of lots.	Overbid. \$. c.	Underbid. \$. c.
"	13	44	.... ..	.... ..
"	14	41	.... ..	.... ..
		611	2426 42	10879 69
392	14	3	.... ..	5594 78
"	15	44	60 43	26669 77
"	16	44	.... ..	29105 17
"	17	44	.... ..	32407 55
"	18	44	.... ..	31559 71
"	19	44	.... ..	39006 63
"	20	41	.... ..	21183 09
"	21	44	.... ..	25666 77
"	22	44	.... ..	32755 12
"	23	44	.... ..	20372 68
38				
"	24	44	.... ..	22267 92
"	25	44	.... ..	27807 73
"	26	44	.... ..	19338 82
"	27	44	.... ..	31513 12
"	28	44	.... 10	3827 88
"	29	44	.... 42	13130 12
"	30	44	1 74	1738 59
"	31	44	.... ..	15916 88
"	32	44	.... ..	19253 17
"	33	44	.... ..	18525 84
"	34	44	.... ..	25603 21
"	35	44	.... ..	32797 58
"	36	44	.... ..	26111 84
"	37	44	.... ..	21712 62
"	38	44	.... ..	14608 81
"	39	44	.... ..	14239 97
"	40	44	.... ..	9418 69
"	41	44	.... ..	26556 97
"	42	44	.... ..	31159 81
"	43	44	.... ..	42151 99
"	44	44	.... ..	20254 65
"	45	44	.... ..	20506 15
"	46	44	.... ..	38566 55
"	47	44	.... ..	26248 07
"	48	44	.... ..	45293 97
"	49	44	.... ..	49017 58
"	50	44	.... ..	34624 05
"	51	44	24017 45
"	52	44	47504 04
"	53	44	9328 18
"	54	44	14143 62
"	55	44	7231 55
"	56	44	12095 96

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Year of sale.	Sheet. No.	No. of lots.	Overbid. \$ c.	Underbid. \$ c.
"	57	44	7375 01
"	58	44	38408 04
"	59	44	.... ..	7775 91
"	60	31	.... ..	26885 64
		2011	\$62 69	\$1,111,279 25

PLAINTIFF'S EXHIBIT JJ.

At a Stated term of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Judicial Circuit, held at the United States Court Rooms, in the Borough of Brooklyn, on the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present—The Hon. Charles L. Benedict, District Judge holding the Court.

ELIAS C. BENEDICT

v.

FREDERICK W. BLECKWENN, as City Treasurer of Long Island City.

A motion having been made by the complainant for an injunction, and said motion coming on to be heard, and George W. Stephens, appearing for the complainant, and J. Ralph Burnett,
 190 for the defendant, and the defendant applying for an adjournment of such motion, it is hereby

Ordered that the argument of said motion be adjourned to the first Friday of October, 1893, at 11½ o'clock in the forenoon of that day, but with leave to either party upon two weeks' notice to the other to bring said motion on for a hearing on any earlier day at which the Court may sit; and on motion of the said George W. Stephens, complainant's solicitor, it is further ordered as a condition for the above adjournment that an injunction be issued, pursuant to the prayer of the Bill of Complaint herein, enjoining and restraining the defendant from receiving upon any redemption from the sales made by him to the complainant herein Elias C. Benedict, of lands in Long Island City for non-payment of assessments levied thereon under the act of the Legislature of the State of New York passed on the 5th day of May, 1874, entitled, "An Act to provide for improvements in and adjoining the First Ward of Long Island City, a more particular statement of the lands so sold being set forth in the said bill of complaint anything except legal tender money of the United States, and also restraining said defendant from marking upon his books as paid any assessment levied under said

act upon said lands so bought by the complainant as to which property affected thereby has been sold by defendant thereunder for less than the amount due thereon, until the further order, judgment and decree of this Court; this order being made without prejudice to the rights of either party or to the said motion.

CHARLES L. BENEDICT,
U. S. J.

191 EASTERN DISTRICT OF NEW YORK, ss:

I, B. Lincoln Benedict, Clerk of the Circuit Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a true copy of an original order on file, and remaining of record in my office in Elias C. Benedict v. Fred'k. W. Bleckwenn as City Treasurer of Long Island City.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the Borough of Brooklyn, City of New York, in the Eastern District of New York, this 28th day of February, in the year of our Lord one thousand nine hundred and ten.

B. LINCOLN BENEDICT,
[SEAL.] *Clerk,*
By J. G. COCHRAN,
Deputy Clerk.

PLAINTIFF'S EXHIBIT PP.

No. 169.

*Certificate of Sale for the Unpaid Assessments for the Improvements
in and Adjoining the First Ward of Long Island City.*

STATE OF NEW YORK,
County of Queens, Long Island City, ss:

I, Frederick W. Bleckwenn, Treasurer and Receiver of Taxes of Long Island City, New York,

Do hereby certify, that under and pursuant to the provisions of Chapter 326, of the Laws of 1874, entitled "An Act to provide for Improvements in and adjoining the First Ward of Long Island City," and the several Acts supplementary thereto, and of Chapter 656, of the Laws of 1886, entitled "An Act in relation to Unpaid Taxes and Water Rates and Rents in Long Island City, and to collect the same, and to insure a more efficient collection of the same in the future," I have this day sold the lands and premises hereinafter mentioned and described, at public auction, to William Nelson in fee (no person having offered to purchase such premises for a term of years), for the payment of the Improvement Assessments levied thereon, and interest thereon as hereinafter specified, and that the following is a description of the premises so sold, the amount of the unpaid Assessments, aforesaid

with the interest, for which such sale was made, and the name of the owner or owners thereof, according to the Assessment Rolls on file in my office.

Description of the premises sold.			Names of the owner or owners of the premises sold, according to the assessment roll.	Improvement assessments and interest, for which the sale was made.	
Ward.	Sub. Dist.	Lot.		Dollars.	Cents.
1	26	19a	Charles U. Ely.	450	89

And I Do Hereby Further Certify, That such sale was made at my office, at the City Hall, in Long Island City, in fee to the highest bidder (no person having offered to purchase such premises for a term of years); and that in case said premises shall not be redeemed within the time prescribed by law, said purchaser or his legal representatives or assigns (on the surrender and cancellation of this certificate of sale) will be entitled, after the time of such redemption having expired, to a proper conveyance in fee, by the said Treasurer and Receiver of Taxes, subject, however, to and upon compliance with the provisions of said Chapter 326, of the Laws of 1874, and the several Acts supplementary thereto, and Chapter 656, of the Laws of 1886. Section 12 of the last mentioned Act provides as follows: "All sales of real estate for such unpaid taxes, assessments, water rates and rents for any year shall be subject to the unpaid taxes, assessments, water rates and rents of subsequent years, to all prior sales for unpaid taxes, assessments, water rates and rents, and to all assessments not then due."

In witness whereof, I have hereunto set my hand, at my said office in Long Island City, this 4th day of January, A. D. one thousand eight hundred and eighty-nine.

F. W. BLECKWENN,
Treasurer and Receiver of Taxes.

In consideration of the sum of one dollar and other valuable considerations, I, William Nelson, do hereby assign and convey to Elias C. Benedict and also all rights which I have thereunder and under and by virtue of the annexed certificate

In witness whereof, I have hereunto set my hand and seal this fourth day of June, 1895.

WM. NELSON.

Sealed and delivered in presence of
CHAS. WANNINGER.

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PLAINTIFF'S EXHIBIT QQ.

This Indenture made the 28th day of April, in the year one thousand eight hundred and ninety one, between Frederick W. Bleckwenn, as Treasurer and Receiver of Taxes of Long Island City, party of the first part and William Nelson, party of the second part.

Whereas, Under and in pursuance of the terms and provisions of Chapter 326 of the Laws of the State of New York for the year 1874, entitled "An Act to provide for Improvements in and adjoining the First Ward of Long Island City," and the several acts supplemental thereto and amendatory thereof, there was duly levied and assessed upon the property hereinafter described, an assessment which remained unpaid at the time of the sale therefor below recited, and

Whereas, The assessment roll, containing said assessment, was duly filed in the office of the Treasurer and Receiver of Taxes of Long Island City, on the Sixth day of December, 1877, and

Whereas, It was provided by the terms of the act above referred to, that all lots, pieces or parcels of land, on which any assessment under said act should remain unpaid on and after the day of the expiration of ten years after the filing of the assessment roll, affecting the section or sub-district in which the lot is located, should be advertised and sold for the payment of such unpaid assessment, and that such sale should be made by the Receiver of Taxes or the Officer, who, at the time of such sale, should be charged by law with the duty of selling lands in said city for non-payment of city taxes, and that the proceedings for such sale should be the same and on

the same notice and like terms, and that said lots or parcels 195 so sold might be redeemed, and in default of such redemption title thereto should be given and perfected in the same manner, to the same extent, and with the same force and effect; and that the costs, fees, charges and expenses of such sale should be the same as should then be prescribed by law for the sale of lands in said city for non-payment of city taxes without further action or legislation on the part of the Common Council or any other body, and

Whereas, At the time of the sale herein below recited the Treasurer and Receiver of Taxes of Long Island City was the officer charged by law with the duty of selling lands in said city for non-payment of city taxes, and such sale was required to be made under and pursuant to the provisions of Chapter 656 of the Laws of the State of New York, for the year 1886, entitled "An Act in relation to Unpaid Taxes, Assessments, Water Rates and Rents in Long Island City, and to collect the same and to insure a more efficient collection of the same in the future," passed June 15th, 1886, and

Whereas, The said Treasurer and Receiver of Taxes, more than sixty days before the 22nd day of December, 1888, caused to be published a notice that the premises below described and other premises on which similar assessments remained unpaid, would be

sold for such unpaid assessments on that day, which notice said Treasurer caused to be published in pamphlet form; such pamphlet containing a list of the several parcels of real estate so to be sold in the same manner substantially as the same were described in the assessment rolls in which such assessments were imposed thereon; together with the name of the person to whom such real estate was

assessed and the amount of the assessment assessed thereon,
196 entered in separate columns, which list was open to public

inspection at said Treasurer's office, for the space of six weeks before such day of sale and up to the time of the sale below recited, and during all of such period copies of such printed list were furnished by said Treasurer to any and all applicants therefor, free of all costs or charges, and

Whereas, Said Treasurer caused to be published once a week, for six weeks, in two newspapers of Long Island City, one of which was an official paper thereof, a general notice that the several parcels of real estate, embraced in the notice aforesaid, would be sold at public auction at the day specified in such notice, which was at the expiration of such six weeks, for the lowest terms of years for which any purchaser would take the same and pay the aggregate amount due thereon; or if no person should so offer to purchase, then in fee-simple to the highest bidder, at the City Hall in said city, to pay the said assessments, interest, percentages and expenses thereon, which should remain unpaid at the time of such sale; which notice also stated that pamphlets containing particulars of the property to be sold might be obtained at said Treasurer's office during office hours, and

Whereas, The said Treasurer and Receiver of Taxes, on the day named in such notice commenced such sale, and duly adjourned the same from time to time to the day on which the sale below recited was made, and conducted the same in the form and manner as prescribed by said Act, and

Whereas, Default has been made in the payment of the assessment assessed as aforesaid upon the lands and premises hereinafter described, and the same had remained due and unpaid for
197 more than ten years from the filing of the said assessment roll in which the same was imposed to the time the notice of sale aforesaid was first published above recited, and

Whereas, In pursuance of the notice of sale given as aforesaid, and the said adjournment thereof, the premises hereinafter described were on the 31st day of December, 1888, to which day said sale had been duly adjourned by the said Treasurer and Receiver of Taxes, sold at public auction to William Nelson the party of the second part hereto in fee (the same having been first offered for sale to any purchaser who would take the same for a term of years and pay the amount for which the same was to be sold, and no person offering to purchase such property for a term of years), for the sum of Twelve Hundred and Seventy one 18/100 dollars, that being the highest price bid for such premises, and

Whereas, The said purchaser at the time of such sale paid to the said Treasurer ten per centum of said sum for which said prem-

ises were sold and the balance thereof within ten days after the sale, and thereupon the said Treasurer duly executed and delivered to such purchaser a certificate in accordance with the provisions of Section VII of said Chapter 656 of the Laws of 1886, setting forth all the details thereby required to be set forth therein, and

Whereas, Notice to redeem was duly given by or under the direction of the Attorney and Counsel to the corporation of said Long Island City more than six months before the second day of March, 1891, to the person or persons having an estate in or lien upon said lands and premises whose estate or lien appeared on record in the office of the Clerk of the County of Queens, at the time of
198 such sale and to any and all purchasers, except said city, under any other sale for taxes, assessments, water rates or rents, or the heirs, legal representatives, registered agent or attorney of record in said office of any or either of said person or persons having an interest therein, which notice conformed to all the requirements of Section VIII of said Chapter 656 of the Laws of 1886, was partly written and partly printed, stated briefly as described in the aforesaid assessment roll, the lot or parcel of land to be redeemed, the amount and rate of interest thereon and expenses required to be paid upon such redemption, that said second day of March, 1891, was the last day for such redemption, and that the amount to be paid therefor might be paid at said Treasurer's office in Long Island City, between nine o'clock in the afternoon and two o'clock in the afternoon, and

Whereas, Such notice to redeem was duly served by a person of full age, who made an affidavit of service as to each person served, stating the time, place and manner of service, the name and residence of the person making the service and his knowledge of the identity of the person served, which affidavit with a copy of the notice served was filed in the office of the said Treasurer within one month after the date of service, and

Whereas, The date named in said notice, as the last day to redeem, was more than eighteen months after the sale above recited, and

Whereas, The time limited for the redemption of said premises from such sale has expired and no redemption of said premises from such sale has been made.

Now therefore, The said Frederick W. Bleekwem, Treasurer and Receiver of Taxes of Long Island City, party of the first part,
199 hereto, by virtue of the said Act, and for and in consideration of the sum of money above mentioned to him in hand paid as aforesaid, has granted, bargained, sold and by these presents does grant, bargain, sell and convey unto the said William Nelson, party hereto of the second part,

All that certain lot, piece or parcel of land, situate, lying and being in Long Island City, Queens County, State of New York, and known and described in the assessment roll above referred to as lot Number 29a in sub-district Number Thirty nine, in the First Ward.

To have and to hold the said premises unto said party of the

second part, his heirs and assigns forever, subject, however, as provided by Section XII of said Chapter 656 of the Laws of 1886.

In witness whereof, The said Treasurer and Receiver of Taxes of Long Island City, has hereunto set his hand and seal, the day and year first above written.

[SEAL.]

F. W. BLECKWENN.

In presence of

JULIUS BEECKWENN.

STATE OF NEW YORK,

Queens County, ss:

On this 29th day of April, 1891, before me personally came Frederick W. Bleckwenn, Treasurer and Receiver of Taxes of Long Island City, to me known and known to me to be the same person described in and who executed the foregoing instrument, and acknowledged that he executed the same.

JNO. F. CROWLEY,
Com'r of Deeds in and for L. I. City.

Recorded in Queens Co. Clerk's office in Liber 959 of Deeds, page 62, on January 25, 1893, at 9:30 A. M.

Examined by W. T. Shipman, Clerk.

Special Master in Chancery,

Supreme Court Commission.

Leon Abbott, Counselor-At-Law, Hudson Trust Co. Bldg., Hoboken, N. J.

Telephone 270.

HOBOKEN, N. J., May 26, 1909.

To the Honorable Herman Metz, Comptroller of the City of New York.

DEAR SIR: On behalf of the holders of two hundred and eighty-three of the First Ward of Long Island City, Improvement Certificates (aggregating, exclusive of interest, \$80,780), issued under authority of an act of the legislature of the State of New York, entitled "An act to provide for improvements in and adjoining the First Ward of Long Island City," passed May 5, 1874, I present this memorial, and statement of facts.

The improvements contemplated by the above mentioned act of the legislature were very extensive; the improvement changed a vast meadow or swamp, of practically no value, into valuable property; streets were laid out and graded, and sewered; a large propor-

tion of the streets were curbed, guttered, flagged and paved. The municipality of Long Island City received a great benefit by reason of increased valuations, and since the consolidation the City of New York has reaped a benefit from this improvement by way of taxes.

The act under which these improvements were made, and under which the certificates held by my clients were issued, provided that a certain Board of Commissioners of Streets, Roads and Avenues should estimate the value of said improvements and certify to the Board of Assessors of Long Island City the costs, charges, &c.—and other necessary expenses thereof, to enable the Assessors to make the proper assessments on the property to be benefited. It was also provided in said Act that the assessments so made, upon the filing of the assessment rolls in the office of the Receiver of taxes, should be a lien upon each lot to the amount of its assessment, with interest at 10% from a date three months after the filing of the assessment roll, and to run until the assessment was paid.

The Act also provided for the issuance of Improvement Certificates so that the work might be carried on without delay; and it provided that the certificates should be paid out at par to the contractors, &c.: that said certificates should bear interest at 7% from their date.

The Act provided for a sale of the lots improved, in case of non-payment of the assessment levied.

Section 11 of the act reads as follows:

Section 11.—Upon the completion of the sales for the non-payment of the assessments levied, as hereinabove provided, of the lots and parcels of land in said improvement district, after the expiration of ten years from the filing of the assessment rolls, all the certificates issued by the said commissioners shall be paid off, and if there be any excess to the credit of said improvement fund in the hands of the treasurer, it shall be paid into the City treasury, in payment of City taxes upon the property assessed hereunder, 202 within said improvement district, in proportion to the amount assessed upon each lot or parcel of land respectively, and the owner of each lot or parcel of land shall have credit therefor upon such taxes.

This section of the act showed a clear intention on the part of the Legislature that all the certificates issued by said Commissioners should be paid with interest; it contemplated a possible excess or surplus by reason of, among other things, the difference in the rate of interest to which the certificate holders were entitled (7%), and the penalty charged against the lot owner for delayed payment of his assessment (10%)—

Those who accepted or took these Improvement Certificates has a right to presume that the amounts called for by the various certificates, with the interest, would be paid—especially where the assessments were levied, and were to be collected by the municipality, with power of sale to enforce the payments by the owners of the property.

The Commissioners did proceed with the work and the amount of

assessments levied was \$2,510,754; deducting therefrom the exemption (\$456,078) and credit certificates (\$107,354), it left an assessment aggregating \$1,947,322; Improvement Certificates were issued to pay for the work—including the labor and materials—to the extent of \$1,847,500.

A large portion of the assessments levied remaining unpaid, it became necessary to sell the property against which these assessments stood, and such a sale was noticed for December 22, 1888, by Frederick W. Bleckwenn, Treasurer and Receiver of Taxes of Long Island City; 728 parcels of land were noticed for sale; the assessments against these parcels aggregated \$318,611 (exclusive of interest or penalty); the same were all sold—at the time of 203 said sale the unpaid assessments on all the lands improved aggregated over \$1,500,000 (exclusive of interest or penalty), and there were at said time outstanding Improvement Certificates of about the same amount (exclusive of interest). At said (first) sale the amount bid for each lot was equal to or in excess of the amount of the assessment against such lot. Where the amount bid was in excess of the assessment due (with interest) the said sum bid was paid by surrender of Improvement Certificates up to the amount of the assessment and interest, and the balance in cash.

At the time these Improvement Certificates were issued, it was not permitted upon sales for non-payment of taxes or assessments in Long Island City, to sell the lands for less than the amount of the liens for which sale was made.

A second sale of (the remaining) property against which these assessments stood was noticed for March 15, 1892, by the same official of Long Island City: said sale was adjourned, and the property was sold on October 17, 1892, and subsequent days. The total amount of the assessments against the lots or parcels in this second sale aggregated (exclusive of interest or penalty) \$1,183,441.51: at this second sale the various parcels (or most of them) were sold for much less than their value, and much less than the amount of the assessment—in some cases as low as five per cent. of the amount of the assessment: the average bid was about 40% of the assessment. The bidders at the sale were allowed to surrender improvement certificates at their face value, with interest, for their bids. This course of procedure necessarily left a large number of certificates outstanding and unpaid: it also took away from the holders of such 204 certificates the security which the act of the legislature under which the certificates were issued, intended they should have: the intent of the legislature, as expressed in the act, was that the holders of these certificates should get their money with interest at 7%, from the date of issue of such certificates.

My clients are, unfortunately, holders of some of these outstanding and unpaid certificates. When these certificates were issued and when my clients received them, there was a real estate security in existence for their payment, that is by way of an assessment on the lands improved: there was not, at that time, any law which would sanction the selling of these lots (the security for the payment of

the certificates) for an amount less than the ~~amount of the assessment~~ and the accrued interest or penalty.

The assessments against the various lots sold have been cancelled, although the bids at the sales and by certificates turned in to pay said bids were in practically every instance at said second sale, much less than the amount of the assessment. A great many of these lots were sold with the legal title to such lot, at an amount mentioned, and he was allowed to pay the amount of Improvement Certificates. Before the sale, he was obliged to pay the full amount due with interest.

At said second sale a number of lots were sold to corporations who were then holders of certificates, and they paid the amount of their bid by the amount of such bid. The record owner of the legal title to the lot, was also allowed to surrender to the municipal authority obtained by him, and these certificates received from the 205 owner of the land were then turned over by the municipal authority to the person who bid at the sale, and he was thus compelled to accept these certificates with which the record owner redeemed his lot, and lose the benefit of his bid or purchase at the sale although such certificates were by this course of procedure made apparently valueless—the assessments being then cancelled, the only security given by the legislature to guarantee the payment of said certificates, was exhausted.

In view of the actions of the authorities in allowing lots to be sold for less than the amount due on the assessment on such lot, and in allowing the owners, after a sale to a third party, to redeem their lots by surrendering certificates, and compelling the bidding bidders at the sales to accept these surrendered certificates and lose all their rights under their bids at the sale, no holder of a certificate could have protected himself without bidding in every lot advertised for sale for the full amount due on the assessment on each lot.

We feel that, by reason of the premises, we have been greatly aggrieved and damaged, and respectfully submit that provision should be made in some way for the payment of the amount due us upon our certificates—the same represented above.

Very respectfully,

DEAN STREET
Attorney for Holders of Improvement Certificates

Mr. Frederick W. Bleekwenn, Treasurer and Receiver of Taxes,
Long Island City.

DEAR SIR: You are hereby notified that a sum of \$100.00 for lots purchased by me in fee on the 24th day of October, 1907,

the sale made by you for unpaid assessments in Long Island City, you are not to receive in redemption anything except lawful money of the United States, and that in case your receiver improvement certificates I will hold you personally responsible for any loss which may result to me from your so doing.

Furthermore, until you shall, in case of an otherwise legitimate sale, pay over to me property which may have been sold by you for unpaid assessments or other amounts due the plaintiff, you shall not receive any part of the amount so paid over to you, and if you do receive any part of such amount, you shall be liable to me for the amount so received, and you shall also be liable to me for the amount so received after such credit.

Respectfully yours,

WM. NELSON.

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Record at Trial.

United States District Court for the Southern District of New York.

Before Hon. Learned Hand, District Judge.

In Equity 6-91.

ELIAS C. BENEDICT, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

NEW YORK, Tuesday, May 9th, 1916.

Appearances:

Charles K. Allen, Esq., Solicitor for Plaintiff, by Stephen A. McIntire, Esq., and Charles K. Allen, Esq., of Counsel, for the Plaintiff.

George T. Nelson, Esq., and Arthur J. Goodman, Esq., for the Defendants.

Mr. McIntire: I would like to make a few observations in this case. Plaintiff is the same as defendant in this case, and he has been compelled to prosecute this case. I found that the last year Plaintiff was not located and I am at this time in the process of attempting to locate him in order to include him in the suit. Plaintiff will be a witness for Plaintiff, because in the trial which he intended to make him will be specifically called into the Plaintiff's examination.

The Court: What do you say Mr. McIntire?

Mr. McIntire: If your Honor please, my objection is that

to the matter of practice than anything else. Of course if they had set up the ten year Statute of Limitations I should have commented upon that particularly in the brief. I have not commented upon that particular phase of the statute, as I told Mr. Nicholson when he first mentioned that to me this morning, but in looking over this case I thought they pleaded this issue and the issue of the Statute of Limitations. If this statute were to have been determined in their favor it would have been a good defense. But as far as I can see, it is not a defense.

"And now defendant, in addition to the foregoing aver, that the commencement of the cause of action of any legal suit may be abated by the commencement of an action on account, or by reason of the several allegations and complaints in the said bill of complaint, did not accrue within ten years before the said bill was filed, and this allegation the defendant makes in law of the complainant's bill, and prays that it may have the same benefit therefrom as if it had formally pleaded the same."

Stipulated that copies of the exhibits may be offered in evidence and submitted in place of originals with same force and effect subject to comparison and correction, should error appear.

The following testimony and exhibits submitted to the Court as *prima facie* proofs.

209 Mr. Nicholson directed the Court's attention to objections throughout the testimony made by defendant to questions and answers.

Objections overruled; exception.

No proofs on behalf of defendant.

Case argued and submitted.

(Testimony and exhibits above referred to are printed hereto-fore at pages 132 et seq.)

Opinion of Hon. Learned Hand, United States Judge.

United States District Court for the Southern District of New York.

James C. Morrison:

Paul D. and Fred F. Tamm:

The defendant in this cause is a corporation, incorporated under the laws of the State of New York, and doing business in a part of Long Island City in the State of New York. It is a manufacturer of slate tiles and tile apparatus for roofing. The original 1921 work was done in 1921, and prior thereto, under the direction of defendant. They were to estimate the cost of such work and certify it to the Board of Education of said City, who

were to assume the same as nearly as might in front of which the work was to be done back enough that a man could stand

of the owners the toll was to be
220 stances office and the Assessors were
obliged to and carried the same
over from information and communication
of those or greater or less number of
the lots in the city, and the Assessors
and the City Treasurer were to receive
and collect the amount of the assessment
and payment of assessments until the next
toll, but thereafter that the same should
be paid by the City Treasurer for the payment of
in the same manner as before for unpaid
any owner of a lot assessed could pay
charge his land from the toll.

The grading, paving, etc., was to be done by the Commissioners, who were to issue "improvement certificates" in payment to the contractors as the work progressed. These certificates were receivable at par in payment of the assessments; they were negotiable and a record was kept of them by the Commissioners. The City Treasurer was likewise directed to cancel all such certificates on receiving them in payment of the assessments.

The plaintiff's position is that Long Island City, by this statute, became a trustee of the lien created by the statute against the lots in question, in trust for the certificate holders, and that since the certificates themselves were not an indebtedness, the only rights of the certificate holders consisted in their rights as beneficiaries against Long Island City as an express trustee to compel it to execute for their benefit the liens so held. They rely particularly for this position upon a part of the language of section 6, which directed

21 the Treasurer on receiving any moneys in payment of such assessments to keep the same separate and apart from all other money in his hands and to pay out no part of the fund

provided that the sale should commence at a reasonable time and place, and that such sales should be made in the city generally. By 1871, which is the Charter, all sales for taxes in period for which any person or assessment, interest, 01 of the Laws of 1879, of any lot for the non-ty of the officer making rates in payment of the received by him should 6 of the Laws of 1886, named in the notice of surer should sell the lots for which any purchaser

would take the same, and pay the aggregate amount due, and if no person should so offer to purchase the property for a term of years then the Treasurer should sell the fee simple of the lot to the highest bidder.

The plaintiff is the holder of large quantities of these certificates, which came into his hands by making advances to some of the contractors who did parts of the paving in question. In the year 1888, ten years having expired since the filing of the assessment rolls, the City Treasurer of Long Island City, one Bleckwenn, advertised the same for sale and conducted a large number of sales upon 212 which he took in purchase of the assessments, improvement certificates. In a large part of the sales conducted by him in that year he received bids equal to the amount of the assessments, the result being that although the lands were cleared from the lien of the assessments, the certificates were reduced in proportion. In the years 1892 and 1893, however, when the City Treasurer advertised other sales, he was in nearly all cases unsuccessful in obtaining the value of the assessment upon the lots sold. He nevertheless accepted the highest bids and took improvement certificates in payment. In this way he sold off the lands assessed so that at the end of the sale there remained unpaid some \$300,000 of improvement certificates, none of which have been paid from that time on. As all the lands assessed had been sold, these certificates have no security under any statute, and the plaintiff sues to recover for the breach of trust arising from this conduct of the city. His position is that either the City Treasurer of Long Island City proceed in contradiction of the Statutes of 1874, 1879 and 1886, taken in combination, or that if these statutes purport to allow the action of the City Treasurer, they were themselves unconstitutional, in that they impaired the obligation of the contract between the city and the certificate holders.

The Court of Appeals of the State of New York in *People ex rel. Rosalie Adele Oakley v. Bleckwenn*, 126 N. Y., 310, decided that the owner of a lot which had been sold under the act in question could compel the City Treasurer to accept these improvement certificates in redemption of her lot from an assessment. This was probably a redemption from one of the sales of 1888, although the case does not distinctly so state. In the case of *Nelson v. Bleckwenn*, 137 N. Y.,

556, the same Court affirmed without opinion the judgment 213 of the General Term for the Second Department relating to the same statute (47 State Rep., 759). One Nelson, who, though not acting in behalf of the plaintiff herein, was acting with his knowledge, had obtained an injunction against the City Treasurer from selling any of the lots under the sale of 1892, for less than the face value of the assessment and receiving in payment improvement certificates instead of cash. The General Term reversed this injunction, holding expressly that the City Treasurer might accept bids for less than the amount of the assessment, and still take the certificates in payment. The result was, therefore, that by February 10th, 1893, the date on which the Court of Appeals handed down its decision in *Nelson v. Bleckwenn*, it was clear that the City Treas-

urer could accept the certificates upon bids for less than the assessment. It was also clear that the City Treasurer proposed to do so, because although the plaintiff through his agent, Wanninger, appeared at the sale in 1892, and protested against the practice, the City Treasurer then informed him of his purpose to continue till the end. As has been said, he did so continue to Wanninger's knowledge till all was finished. This bill was filed on July 21, 1910, which was therefore more than eighteen years after the City Treasurer had taken the position of which the plaintiff now complains, and more than seventeen years after it had been decided in the Court of Appeals that he was right in his construction of the statutes.

The defendant raises three points: First, that the City of New York, the successor in interest of Long Island City, is in no case the proper party defendant, since the Commissioners were the agents of the State of New York and could create no liability of the City; second, that the Statutes of New York authorized the course 214 adopted, which was legal, and that the later statutes effected only a remedy and not the right of the certificate holders; third, that in any event the Statute of Limitations has long since applied.

Stephen A. McIntire and Charles K. Allen, for the Plaintiff.

George P. Nicholson and Arthur L. Goodhart, for the Defendant.

LEARNED HAND, D. J.:

The Court of Appeals of the State of New York has construed the effect of the two subsequent enactments upon these certificates. It has decided that the Law of 1879, gave to the County Treasurer the right to accept certificates in payment of the assessments and that the Laws of 1886 authorized him to accept bids for less than the assessments. As a matter of statutory construction, including the Constitution of the State of New York, this is conclusive upon me and the only question which could be open is whether the effect of those two statutes when taken together might not be to impair the obligation of the contract. The effect of those decisions seems to me to give a direct preference to those certificate holders who happen to present their certificates at the sales of lands, or to sell them to owners of assessed property. As I said upon the argument, the case of the other holders is precisely similar to what would be the fate of minority bondholders who did not come into a reorganization agreement, if those bondholders who did were permitted to use the face of their bonds upon the purchase price. Everyone knows that the custom in those cases is to credit upon the bonds only that proportion of the amount of the purchase price which the bonds presented by the reorganization committee bears to the total issue. I

think there would be a genuine question of constitutionality 215 of the Statutes of 1879 and 1886 which gave a part of the certificate holders such a priority over the rest.

This question does not, however, seem to me to be open for consideration in this case because the bill is clearly barred by the

Statute of Limitations. The plaintiff's answer is that the Statute of Limitations never runs against the beneficiary of an express trust unless the Trustee has openly repudiated his obligations to the knowledge of the beneficiary himself. I may accept that doctrine, which happens to have been affirmed in a case very similar in subject matter in the Supreme Court, *New Orleans v. Warner*, 175 U. S., 131. That case is not applicable, however, to the facts in the case at bar, even assuming that the defendant in the case at bar in any event could be held liable. Its obligations as Trustee, according to the plaintiff's own theory, consisted in foreclosing the liens of the assessments for the benefit of the certificate holders and keeping and distributing among them the money which was realized. The alleged breach of trust rested in what the Trustee supposed was the final execution of these obligations. When the city sold all the lots and accepted the certificates in payment, it undertook, and as it supposed it successfully undertook to wind up the whole proceeding, and if some of the certificates remained unpaid, that was supposed to be one of the misfortunes inherent in the situation. Moreover, in doing this, the city, if a Trustee, was guilty of no fraud, for it had the authority not only of the statutes of the State of New York, but of a decision of the highest Court of that State, which affirmed the propriety of the course undertaken by the City Treasurer.

Furthermore, as early as 1892 the City Treasurer had upon 216 protest made by the plaintiff, openly avowed his determination to pursue that course now indicated as a breach of trust. He had not only asserted that purpose, but had pursued in the face of an attempted injunction from the Courts and had successfully pushed through all the Courts to its conclusion his position. It is a little difficult to see what more open, definite and final repudiation of his duties he could have made, assuming that his duty was not to accept certificates upon bids for less than the amount of the assessments.

It is not necessary, I think, to consider whether a federal court of equity will feel itself absolutely bound by the State Statute of Limitations, *Kirby v. Lake Shore, etc., Railroad*, 120 U. S., 130, 138. There are undoubtedly certain principles by which it will feel itself guided, independently of State statutes. But where no such rules intervene, Federal Courts are accustomed in practice to follow the local statutes even in cases of exclusive, and not of concurrent, jurisdiction, *Clarke v. Johnston*, 18 Wall., 493; *Philippi v. Philippe*, 115 U. S., 151; *Pearsall v. Smith*, 149 U. S., 231; *Speidel v. Henric*, 120 U. S., 377. *Clarke v. Johnston*, *supra*, was the case of an express trust, where the Trustee had closed up the estate and disposed of the property, as he supposed, forty years before bill filed. The cause might no doubt have been disposed of upon the ground of general laches, but the Court applied the Statute of Limitations of New York affecting suits in equity. Eighteen years is less than forty, but it is nearly twice as long as the New York Code prescribes.

Nor, if the case be looked at as involving only laches, is there any ground for a different result. The delay is unexcused, certainly after the Court of Appeals decided *Nelson v. Bleckwenn*, *supra*. If any constitutional question existed, it was time then to invoke it, nor is it an excuse that much time was lost in negotiations. If the negotiations were not to count, that should have been so understood at the outset. Nothing occurred which justified the reservation of the point for so many years.

Bill dismissed, but under all the circumstances without costs.

May 13th, 1916.

L. H., D. J.

DecreeAppealed From.

At a Stated Term of the District Court of the United States for the Southern District of New York in the Second Circuit, held at the United States Court Room in City of New York on the 24th day of May, in the year one thousand nine hundred and sixteen.

Present: The Honorable Learned Hand, United States District Judge.

In Equity 6-91.

ELIAS C. BENEDICT, Complainant,

against

THE CITY OF NEW YORK, Defendant.

This cause coming on to be heard at the May Term of the said Court in the year one thousand, nine hundred and sixteen,
218 upon the pleadings and proofs, and being argued by counsel for the respective parties and it appearing that the complainant alleged in his bill of complaint and claimed upon said hearing that the provisions of Chapter 501 of the Laws of 1879 of the State of New York, and Chapter 656 of the Laws of 1886 of the State of New York, were unconstitutional, null and void in so far as the City Treasurer and Receiver of Taxes of Long Island City purported to act thereunder, and in conflict with the provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States and of Section 1 of the 14th amendment of said Constitution and were in violation of the Constitutional rights of the complainant thereunder; now upon consideration thereof:

It is ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed without costs.

LEARNED HAND,
United States District Judge.

219 *Order for Substitution of Attorneys.*

At a Term of the United States District Court, held at the Post Office Building in the Borough of Manhattan, City, County, State and Southern District of New York, on the 29th day of June, 1916.

Present: Honorable Julius M. Mayer, United States Judge,

In Equity 6-91.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

Upon reading and filing the annexed consent of Allen & Chard, Esqs., and of Charles K. Allen, Esq., and of Elias C. Benedict, Esq., and on motion of Reed & McCook, Esqs., it is

Ordered that Reed & McCook, Esqs., of 15 William Street, Borough of Manhattan, City of New York, be substituted as attorneys for the complainant in the above entitled cause in place of Allen & Chard, Esqs., and Charles K. Allen, Esq.

Enter,

J. M. MAYER, U. S. J.

220 *Assignment of Errors.*

United States District Court, Southern District of New York.

In Equity 6-91.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

Now comes the complainant and files the following assignment of errors upon which he will reply upon his appeal from the decree made by this Honorable Court on the 13th day of May, 1916, in the above entitled cause.

1. That the Court erred in granting the application of the defendant to dismiss the bill of complaint herein and in dismissing the said bill of complaint.
2. That the Court erred in decreeing that the complainant was not entitled to the relief prayed for in his bill of complaint.
3. That the Court erred in ruling that the decisions of the Court of Appeals of the State of New York were conclusive upon it insofar

as they construed Chapter 501 of the Laws of 1879 of the State of New York and Chapter 656 of the Laws of 1886, of the State of New York, to the extent that said decisions purported to hold that the said Chapter 501 of the Laws of 1879, legally gave to Long Island City through its City Treasurer and Collector of Taxes or to said City Treasurer and Collector of Taxes of Long Island
221 City the right to accept First Ward Long Island City Improvement Certificates issued under said Chapter 326 of the Laws of 1874, in payment of assessments and insofar as they purported to hold that said City or the said City Treasurer and Receiver of Taxes had a right to sell lands assessed under said Chapter 326 of the Laws of 1874, for less than the amount of the assessments thereon.

4. That the Court erred in not holding that the said Chapter 501 of the Laws of 1879, of the State of New York, was unconstitutional and null and void and in violation of the provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States and in violation of Section 1, of the 14th Amendment to said Constitution, insofar as said Act purported to give purchasers at the assessment sales of lands assessed pursuant to said Chapter 326 of the Laws of 1874, the right to use said Improvement Certificates of Long Island City in payment of lands purchased by them at said sales, and to give the right to, and create the duty upon, said Long Island City through its City Treasurer and Receiver of Taxes and said City Treasurer and Receiver of Taxes of Long Island City, to receive them in payment.

5. That the Court erred in not holding that the said Chapter 656 of the Laws of 1886 was unconstitutional and null and void and in violation of the provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States and of Section 1 of the 14th Amendment to said Constitution, insofar as said Act purported to give purchasers at the assessment sales of lands sold pursuant to said Chapter 326 of the Laws of 1874, the right, and to create a duty upon
222 and give the right to said City of Long Island City through its City Treasurer and Receiver of Taxes and said City Treasurer and Receiver of Taxes to sell said lands for less than the full amount of the assessment, interest, percentage and expense.

6. That the Court erred in holding that the bill of complaint and the right of the complainant thereunder were barred by any Statute of Limitations.

7. That the Court erred in holding that the bill of complaint and the right of the complainant thereunder were barred by laches.

8. That the Court erred in holding that the only duties as Trustee of the City of Long Island City or its said City Treasurer and Receiver of Taxes, under said Chapter 326 of the Laws of 1874, consisted in foreclosing the liens of the assessments for the benefit of the holders of Improvement Certificates, and in keeping and distributing among them the money realized thereupon.

9. That the Court erred in holding that the sale by the City of Long Island City, through its City Treasurer and Receiver of Taxes and said City Treasurer and Receiver of Taxes of the lands assessed

under said Chapter 326 of the Laws of 1874, for less than the amount of the assessment, interest, percentage and expenses, was the final execution by it of the trust duties imposed by said Act upon said City of Long Island City and its said City Treasurer and Receiver of Taxes.

10. That the Court erred in holding that the City of Long Island City when it, through its City Treasurer and Receiver of Taxes, sold the lands, assessed under said Chapter 326 of the Laws of 1874 for less than the amount of the assessment, interest, percentage and expenses, and accepted Improvement Certificates issued under said

Chapter 326 of the Laws of 1874 in payment, it undertook,
223 or supposed it successfully undertook, to complete its duties
as Trustee under said Chapter 326 of the Laws of 1874, and
that the fact, that the Improvement Certificates issued under said
Chapter 326 of the Laws of 1874 remained unpaid after said sale,
was one of the misfortunes inherent in the situation.

11. That the Court erred in holding that the City of Long Island City had the right under the statutes of the State of New York to sell the lands assessed under said Chapter 326 of the Laws of 1874 for less than the amount of the assessment, interest, percentage, and expenses, or to receive, from the purchasers at said sales, Improvement Certificates issued under said Chapter 326 of the Laws of 1874, in payment, and that the purchasers had the right to use said certificates in payment; for the reason that Chapter 586 of the Laws of 1886, the statute which purported to give this right, was unconstitutional and null and void and in violation of said provisions of the Constitution of the United States and the amendments thereto, insofar as said statute was in conflict with the rights of the complainant, a holder of said Improvement Certificates issued under said Chapter 326 of the Laws of 1874.

12. That the Court erred in holding that the breach of trust of the City of Long Island City through its City Treasurer and Receiver of Taxes in selling the land so assessed for less than the amount of the assessment, interest, percentage and expenses, was a repudiation of its trust duties under said Chapter 326 of the Laws of 1874.

13. That the Court erred in not holding that there were trust duties under said Chapter 326 of the Laws of 1874 still to be performed by said City of Long Island City through its City
224 Treasurer and Receiver of Taxes and by said City Treasurer
and Receiver of Taxes, for the benefit of the holders of Improvement Certificates issued under said Chapter 326 of the Laws of 1874, and to others; after the said City of Long Island City through its said City Treasurer and Receiver of Taxes and said City Treasurer and Receiver of Taxes had sold said lands so assessed under Chapter 326 of the Laws of 1874 for less than the amount of the assessment, interest, percentage and expenses.

14. That the Court erred in not holding that the sale by the City of Long Island City through its City Treasurer and Receiver of Taxes and by said City Treasurer and Receiver of Taxes, of lands assessed under said Chapter 326 of the Laws of 1874 and thereafter sold under said Chapter 586 of the Laws of 1886, for less than the

amount of the assessment, interest, percentage, and expenses; and receiving said Improvement Certificates in payment, was not in violation of the complainant's rights under Chapter 461, Title 6, Section 23, of the Laws of 1871 of the State of New York which was in force at the time said Improvement Certificates held by complainant were issued and acquired by him, and which Act of 1871 provided that all sales for taxes should be made for the shortest period for which any purchaser would take the premises and pay the taxes or assessment, interest, percentage and expenses.

15. That the Court erred in holding that the time occupied by complainant in negotiating with defendant and its predecessor the City of Long Island City, for a settlement of his said claim, was not an excuse for delay in starting the above action, to the extent that time was bona fide occupied in said negotiations.

Wherefore the appellant, the complainant in the Court below,
225 prays that the decree of said Court may be reversed; and
 in order that the foregoing assignment of errors may be a
 part of the record, the complainant presents the same to the
Court and prays that such disposition may be made thereof as in
accordance with the law and the statutes of the United States in such
cases made and provided, and that the United States District Court
for the Southern District of New York be instructed to enter such
decree as is prayed for by the complainant in his said bill of com-
plaint.

All of which is respectfully submitted,

REED & McCOOK,
Solicitors for Complainant,
15 William Street, New York City.

Filed July 5, 1916.

Petition for Appeal.

District Court of the United States, for the Southern District of
New York.

In Equity, 6-91.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

Petition for Appeal Filed July 5th, 1916, in the District Court of
the United States for the Southern District of New York.

To the Honorable Learned Hand, District Judge:

226 The above named complainant feeling himself aggrieved
 by the decree made and entered by the above mentioned
Court in this cause, on the 24th day of May, 1916, wherein

and whereby it was ordered, adjudged and decreed that the bill of complaint be dismissed, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit, and he prays that this his appeal be allowed and that citation issued as provided by law and that a transcript of the record and of the proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, sitting at the Post Office Building, Borough of Manhattan, City, County and Southern District of New York.

And your petition further prays that a proper order touching the security to be required of him to perfect his appeal be made.

Dated, New York City, June 22nd, 1916.

REED & McCOOK,
Solicitors for Complainant.

Appeal allowed July 5th, 1916.

LEARNED HAND,
United States District Judge.

227

Order Allowing Appeal.

District Court of the United States for the Southern District of New York.

In Equity, 6-91.

ELIAS C. BENEDICT, Complainant,
against

THE CITY OF NEW YORK, Defendant.

On motion of Messrs. Reed & McCook, solicitors for the complainant,

It is ordered that the appeal to the United States Circuit Court of Appeals for the 2nd Circuit from the final decree filed and entered herein on the 24th day of May, 1916, dismissing the bill of complaint of the complainant herein, be and the same hereby is allowed and a certified transcript of the record and of all proceedings herein, be forthwith transmitted to the United States Circuit Court of Appeals for the 2nd Circuit at New York City, State of New York; and it is

Further ordered that the bond on appeal be fixed at the sum of \$250.00.

Dated, New York City, July 5, 1916.

LEARNED HAND,
*Judge of the District Court of United States,
for the Southern District of New York.*

Filed July 5, 1916.

228

Bond on Appeal.

District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

ELIAS C. BENEDICT, Complainant, Appellant,
against

THE CITY OF NEW YORK, Defendant, Respondent.

Know all men by these Presents, That Elias C. Benedict, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named The City of New York, in the sum of two hundred and fifty (\$250.00) dollars to be paid to the said The City of New York, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, Executors, Administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 22nd day of June, 1916.

Whereas, the above named Elias C. Benedict, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

229 Now, therefore, the condition of this obligation is such that if the above named Elias C. Benedict shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

E. C. BENEDICT, [L. S.]
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,

Resident Vice-President.

Attest:

E. V. T. EVANS,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 26th day of June, 1916, before me personally came the within named Elias C. Benedict, to me known, and known to me to be the individual described in and who executed the within bond and he acknowledged that he executed the same.

GUSTAVUS MAYER,
Notary Public, No. 265, New York County.

Register's No. 7147.

My commission expires March 30, 1917.

Affidavit, Acknowledgment and Justification by Guaranty or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 22nd day of June, 1916, before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing bond of Elias C. Benedict, as surety, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Elias C. Benedict is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said company, and that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of said company; and that the signature of said N. V. Tynan, subscribed to said bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of six million dollars.

WM. A. THOMPSON,
(Deponent's Signature).

Signed, sworn to, and acknowledged before me this 22nd day of June, 1916.

H. E. EMMETT,
Notary Public, etc.

I approve of the *written* bond, and of the sufficiency of the surety thereon.

July 5, 1916.

LEARNED HAND, U. S. J.

231

Order as to Testimony.

At a Term of the United States District Court, Held at the Post Office Building in the Borough of Manhattan, City, County, State and Southern District of New York, on the 1st Day of August, 1916.

Present: Honorable Learned Hand, United States Judge.

In Equity, 6-91.

ELIAS C. BENEDICT, Plaintiff,
against

THE CITY OF NEW YORK, Defendant.

Upon reading and filing the annexed consent of the parties hereto providing that the testimony taken of witnesses be reproduced in the record on appeal in the exact words of the witnesses, it is

Ordered that the testimony of the witnesses taken before Barker D. Leich, Esq., may be reproduced in the record on appeal in the exact words of the witnesses.

LEARNED HAND,
United States Judge.

232

Citation.

By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To City of New York, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 4th day of August, 1916, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Elias C. Benedict, is appellant and you are respondent to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this fifth day of July, in the year of our Lord One Thousand Nine Hundred and sixteen, and of the Independence of the United States the One Hundred and Forty-first.

LEARNED HAND,
*Judge of the District Court of the United
States for the Southern District of New York,
in the Second Circuit.*

A copy of the within paper has been this day received at the office of the Corporation Counsel, July 11th, 1916.

LAMAR HARDY,
Corporation Counsel.

233

Stipulation for Record.

District Court of the United States, for the Southern District of New York.

In Equity, 6-91.

ELIAS C. BENEDICT, Plaintiff,
against

THE CITY OF NEW YORK, Defendant.

It is stipulated and agreed by and between the attorneys for the parties in the above entitled action that the benefits of the provisions of equity rule Number 75 be waived and that the testimony taken on the trial of the action may be set forth in the case on appeal, in question and answer form and that it need not be set forth in narrative form as required by the said rule, and it is

Further stipulated that the following exhibits in the above case shall be printed and form a part of the record on appeal; Exhibits "A" (omitting schedule attached), "C," "D," "E," "F," "H," "I," "J," "K," "L," "N," "P," "R," "S," "U," "W," "X," "Z," "BB," "CC," "EE," "GG," "II," "JJ," "PP," "QQ," "RR" and "SS"; and it is

Further stipulated that the other exhibits in the case need not be printed and set forth in the case on appeal, but the same may be handed up upon the argument of this appeal; and it is

Further stipulated that the record on appeal shall consist of the following pleadings, proceedings and papers, to wit:

234 1. Complaint of the plaintiff.

2. Answer of defendant, as amended at the trial.

3. Replication of the plaintiff.

4. Order of Hon. Learned Hand, United States Judge, made in the above entitled case on March 24, 1913, providing for the examination of witnesses before Barker D. Leich, Esq., as Commissioner.

5. Return of Barker D. Leich, Esq., including exhibits therein mentioned, and stipulations therein contained and testimony of the following witnesses taken before Barker D. Leich, Esq., as Commissioner, pursuant to said order of March 24, 1913, which testimony is now on file in the office of the Clerk of the United States District Court, for the Southern District of New York: Elias C. Benedict, George E. Clay, Charles Benner, Charles K. Allen, Christian Rehmke, Henry S. Kearny, and Charles Wanninger.

6. Record at trial.

7. Opinion of Hon. Learned Hand.

8. Decree of May 24, 1916, of the United States District Court for the Southern District of New York, per Hon. Learned Hand, United States Judge.

9. Order of the United States District Court for the Southern District of New York of June 29, 1916, substituting Reed & McCook, Esqs., as attorneys for the plaintiff.

10. Plaintiff's assignment of errors.

11. Plaintiff's petition for appeal.

235 12. Order of July 5th, 1916, allowing appeal.

13. Appeal bond.

14. Citation and proof of service.

15. Order as to testimony.

16. Stipulation for record.

Dated, New York City, July 27, 1916.

REED & McCOOK, Esqs.,
Solicitors for Appellant.

LAMAR HARDY,

Corporation Counsel of the City of New York,
Solicitor for Respondent.

Stipulation as to Record.

United States District Court, Southern District of New York.

ELIAS C. BENEDICT, Plaintiff,

v

THE CITY OF NEW YORK, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated December 11th, 1916.

REED & McCOOK,
Attorneys for Plaintiff.
LAMAR HARDY, Esq.,
Attorney for Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

ELIAS C. BENEDICT, Plaintiff,

v.

THE CITY OF NEW YORK, Defendant.

I, Alexander Gilechrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do

hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 22nd day of December, in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the said United States the one hundred and forty-first.

ALEX. GILCHRIST, Jr.,
[SEAL.] Clerk.

237 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1916.

No. 207.

Argued April 10, 1917; Decided August 6, 1917.

ELIAS C. BENEDICT, Complainant-Appellant,

v.

CITY OF NEW YORK, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

Reed & McCook, Esqs., Solicitors for Complainant-Appellant.
Lamar Hardy, Attorney for Appellee.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The complainant is a citizen of the State of Connecticut and brings his bill against the defendant, a municipal corporation organized under the laws of the State of New York, and having its principal place for conducting its business in the Southern District of that State, being a resident thereof.

The bill of complaint is a voluminous one and covers forty-nine printed pages.

The complainant sues on his own account and on behalf of all others similarly situated.

It appears that defendant is sued as the successor of Long Island City which became annexed to and consolidated with the City 238 of New York by Chapter 466 of the Laws of 1901 of the State of New York.

The City of Long Island, being at the time a municipal corporation of the State of New York, prior to June 11, 1879, issued and delivered to Farwell, Sage and Company, through its treasurer and receiver of taxes, certain certificates amounting in the aggregate to

the sum (face value) of \$8,000.00 which certificates were payable with interest at the rate of seven percent. The certificates were issued to Farwell, Sage and Company under a certain contract between that company and the city of Long Island for the opening up of certain streets in that city. Each and every one of these certificates was assigned to the complainant prior to June 11, 1879, and he at all times since has claimed to be the lawful owner and holder thereof. These certificates, part of a total issue of \$1,847,500 have never been paid, although complainant has made demand and taken various steps for their collection.

The certificates were issued under Chapter 326, of the Laws of 1874, of the State of New York. The statute in question created an Improvement Commission which was authorized to make certain improvements in what was then known as the First Ward of Long Island City. For the purpose of paying for the improvements, the Commission was authorized to issue certificates. To secure payment of these certificates, assessments were levied on certain properties in Long Island City. The statute provided that if, at the end of ten years, the assessments were not paid, the properties could be sold by the treasurer and receiver of taxes of Long Island City.

Complainant's proposition is that the members of the Commission and their employees, and those who assisted them in the performance of their duties under that legislation, were local officers of Long Island City, and that that municipality and its successor, the present defendant, is liable for their wrongful acts.

And he contends, in particular, that the defendant and its predecessor were guilty of a breach of an express statutory trust.

239 The trust which complainant relies upon is alleged to have been created by the Act of 1874 which established an Improvement Fund for the payment of the improvement certificates and which directed that it should be set apart and administered for the benefit of the certificate holders. The method by which the Fund was to be provided will appear more fully in the opinion which follows.

The breach of the trust which is alleged to have been committed, grows out of certain acts of the treasurer of Long Island City, which had the effect of impairing the Improvement Fund and leaving unpaid a large number of the certificates including those held by the plaintiff. The facts relating to the breach will appear more fully hereafter.

The District Court dismissed the bill without costs.

ROGERS, *Circuit Judge*, (after stating the above facts): The first matter to be considered is that which relates to the jurisdiction of the court. In the court below the defendant did not raise the question and the District Judge made no reference to it in his opinion. But the defendant in his argument in this court has asserted a want of jurisdiction in the court. The claim rests upon that section of the Judicial Code which provides that "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor

of any assignee, or of a subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made, etc." U. S. Compiled Statutes (1916) Annotated, sec. 991. The argument is that if no assignment had been made of these certificates by Farwell, Sage and Company of the City of New York to whom they were originally issued, no suit could have been brought as there would not have been the requisite diversity of citizenship. Therefore, it is said the complainant as the assignee of Farwell, Sage and Company cannot maintain the suit as the subject matter of the suit is choses in action, and the bill contains no averment that suit could have been maintained by the assignees if no assignment had been made. And the counsel call our attention to the fact that the Supreme Court has held in a series of cases beginning with *Turner — Bank of North America*, 4 Dall. 8 (1799) that the presumption is that a cause is without jurisdiction of the court unless the facts which confer jurisdiction are set forth upon the record.

The complainant's brief however contains the following statement:

"The allegations in the bill of complaint, and the decree appealed from, makes it clear that a Federal Constitutional question is raised. That such a question is raised under the pleadings appears from:

Penn. Mutual, etc., Co. v. Austin, 168 U. S. 685,695.

Leonard v. City of Shreveport, 28 Fed. 257."

It is evident that the complainant bases his right to sue not upon diversity of citizenship, although he is a citizen of Connecticut and defendant is a citizen of New York, but upon the ground that a federal question is involved. The federal question presented is that complainant claims that he has been deprived of his property without due process of law, and that the obligation of the contract under which the certificates sued upon were issued has been impaired by certain legislation of the State of New York. Where the right claimed is founded, as it is in this case, on a federal question, diversity of citizenship of the parties is immaterial and unnecessary. *Elk v. Wilkens*, 112 U. S. 94.

The jurisdiction does not turn upon the validity of the claim set up, but upon the fact that there is a real and substantial controversy respecting a federal question. The claim that the contract has been impaired is made in good faith and is not frivolous, and the court has jurisdiction. *Pacific Electric Ry. Co. v. Los Angeles*, 194 U. S. 112.

241 This brings us to inquire as to the real merits of the controversy.

The Laws of 1871 of the State of New York Chapter 765, entitled "An Act to provide for the laying out of streets, avenues, roads and parks in Long Island City," named certain persons therein designated as commissioners for the purpose of performing the acts and

duties prescribed by the statute, including the power to grade, sewer and pave streets within the district described.

The Laws of 1874, Chapter 326, entitled "An Act to provide the charter of Long Island City and in force when the certificates were issued, provided that all sales for taxes in that city should be made for the shortest period for which any person would take the premises and pay the taxes or assessments, interest percentage and expenses.

The Laws of 1874, Chapter 526, entitled "An Act to provide for improvements in and adjoining the First Ward of Long Island City," directed the commissioners to ascertain and certify to the board of assessors the expenses of the grading, sewerizing, paving, etc., provided for in the Act. It required the estimated cost to be assessed upon the several lots within the improvement district, and declared that the assessment should be a lien on the property assessed to the extent of the amount assessed together with the interest at the rate of 10 per cent. per annum. The interest was to commence to run three months after the filing of the assessment roll, and was to run until the assessment with interest was fully paid.

Section 5 of the Act provided as follows:

"No warrant shall be issued or required for the collection of any assessments under this act; nor shall any warrant be issued for any sale of lands for non-payment of such assessment until ten years after the filing of such assessment roll; but all lots, pieces or parcels of land on which any assessment under this act shall remain unpaid on and after the day of the expiration of ten years after the filing

of the assessment roll, affecting the section or sub-district 242 in which the lot is located, shall be advertised and sold for

the payment of such unpaid assessment; and such sale or sales shall be made by the receiver of taxes or other officer than charged by law with the duty of selling lands in said city for non-payment of city taxes and the proceedings for such sale, and such sale shall be the same, and on the notice and like terms; and said lots or parcels of land so sold may be redeemed, and in default of such redemption title thereto shall be given and perfected in the same manner, to the extent and with the same force and effect;
* * *

Section 6 of the Act provided as follows:

" * * * * The improvement certificates hereinafter provided for shall be receivable at all times at par and accrued interest in payment of any assessment under this act, and of the interest accrued thereon. All moneys received by said treasurer in payment of such assessments or interest shall be placed to the credit of the improvement fund, consisting of the amounts in the hands of the treasurer growing out of payments of said assessments, and interest, and shall be kept separate and apart from any other moneys in his hands, and no part of said fund shall ever be paid out by him, except for the purpose of such improvement certificates as provided in the sev-

enth section of this act, or as herein otherwise provided. * * *

Section 9 of the Act authorized the commissioners in order to pay the expenses of the improvements to issue from time to time, and as required by and under the contracts made by them, certificates of indebtedness, which certificates should be known as the "Improvement certificates in Long Island City." It provided that such certificates should be paid out at par to contractors for payment falling due to them upon contracts for work or materials furnished.

It provided that:

243 "They (certificates) shall be receivable at all times, at par and accrued interest in payment of any assessments laid under this act and of the accrued interest thereon and shall be payable with interest as aforesaid in the manner hereinabove provided, out of any moneys which shall come into the said treasurer's hands to the credit of said improvement fund."

It also provided that "on receiving any of said certificates in payment of assessments or interest, or by purchase, as hereinbefore provided, said treasurer shall cancel such certificate, etc."

Section 2 of the act provided:

"Upon the completion of the sales for the non-payment of the assessments levied, as hereinabove provided, of the lots and parcels of land in said improvement district, after the expiration of ten years from the filing of the assessment rolls, all the certificates issued by the said commissioners shall be paid off, etc."

The laws of 1879, Chapter 501, section 10, provided that at the sale of any lot for non-payment of assessments it should be the duty of the officer making the sale to receive the improvement certificates in payment of the assessments, and that such certificates when received by him should be permanently cancelled.

In 1886 an Act was passed governing tax sales in Long Island City known as Chapter 656. This act authorized the City Treasurer to sell lands at public auction for non-payment of taxes or assessments and provided that such sales should be, "For the lowest term of years for which any purchaser will take the same and pay the aggregate amount due thereon, and if no person shall so offer to purchase such property for a term of years, said Treasurer or his representative shall sell such parcel at fee simple, to the highest bidder * * * Said Treasurer shall bid in in the name of the

244 city for the use of the proper fund or account of all parcels or real estate at such sale, to be sold for unpaid taxes, assessments, water rates and rents, which shall not be sold to any other person."

The act also provided if real estate so sold was not redeemed as provided for in the act the treasurer should execute to the purchaser a lease, or if sold in fee a conveyance which conveyance should vest in the grantee an absolute estate in fee and that the lien or liens for which the same had been sold should thereupon be cancelled.

The improvements made under the Act of 1874 were considerable and expensive, and converted what was a vast meadow or swamp of practically no value into a valuable property. Streets were laid out,

graded and sewered. A large proportion of these streets were curbed, guttered, flagged and paved.

The contractors who did the work were paid in improvement certificates which they took at par. These certificates were payable only out of an improvement fund which we have seen the law required to be raised by assessments levied upon the property benefited, and which constituted a lien upon each lot to the amount of its assessment with a penalty charged for delayed payments.

The law under which the certificates were issued, provided for a sale of the lots assessed in case of the non-payment of the assessments levied, and as a large portion of the assessments remained unpaid it became necessary for the treasurer of Long Island City to advertise the lots for sale. The first sale occurred in December, 1888. At that sale the amount bid for each lot was equal to or in excess of the amount of the assessment. But in 1892 and 1893 subsequent sales were made, and lots were sold for much less than that for which they were assessed. In some instances sales were made for only 5 per cent of the assessment, and the average price at which the lots were sold was 40 per cent of the amount of the assessment. The result in short was that the Improvement Fund which the Act of 1874 provided for and out of which the certificates alone were payable

245 was not produced in the amount originally contemplated, and after all the lands assessed had been sold there were certificates having a face value of \$300,000 which were left unpaid and with no fund out of which payment could be made as originally provided. It appears that the plaintiff acquired a number of these unpaid certificates. They came into his possession as a member of the banking house of Benedict, Flower & Company. He was the senior member of that house and Mr. Flower who was associated with him, afterwards became Governor of the State of New York. This house advanced to the contractors, Farwell, Sage & Co., the money which was used in making the improvements, and for the moneys so advanced Benedict Flower & Co. received payment in certificates issued to the contractors by the authorities of Long Island City. The certificates sued upon, as has been heretofore mentioned, aggregate the sum (face value) of \$8,000.00, and were received by the plaintiff as a part of his share in the assets of the firm of Benedict, Flower & Co., and on its dissolution in 1875 he has been the owner and holder of them ever since.

The plaintiff does not claim that any primary obligation to pay the certificates existed on the part of Long Island City; and this suit is not brought to enforce any such liability. He does not claim that the certificates were in the nature of promissory notes for the payment of money, given by Long Island City as promisor.

The plaintiff claims:

1. That the commissioners appointed under the act of 1874 for the purpose of making certain improvements in Long Island City to pay for which the certificates were issued were the agents and representatives of the city, for whose acts the city was liable. This the defendant denies and asserts that the commissioners were independent public officers and not servants or agents of the municipality. This

question, for reasons hereinafter appearing, the court does not find it necessary to determine.

The plaintiff also claims:

2. That the treasurer and receiver of taxes of Long Island City was a local officer and agent of the city in the performance of 246 the acts performed by him in and about the conduct of the assessment sales herein mentioned, and that for his acts the city was in like manner liable. This the defendant likewise denies. This question, for reasons hereinafter appearing, the court also finds it unnecessary to pass upon.

The plaintiff also claims:

3. That the treasurer, and therefore Long Island City, was in fault because lots assessed for the improvements made were sold for less than the assessments and accrued interest, and for not preserving the lien of the assessments intact.

This the defendant likewise denies and calls attention to the decision of the Court of Appeals of New York in *Nelson v. Bleckwenn*, 137 N. Y., 556, which affirmed without opinion the judgment of the General Term for the Second Department reversing the action of the court below in issuing an injunction against the treasurer of Long Island City which restrained him from selling any of the lots for less than the face value of the assessment and from receiving in payment improvement certificates instead of cash. The General Term expressly held that the treasurer might accept bids for less than the amount of the assessment and still accept the certificates in payment. This the court thought allowable under the Acts of 1879 and 1886. The question as to whether these Acts violated the Constitution of the United States was not discussed and does not appear to have been considered.

The plaintiff contended on the argument before us that the Acts violate the Federal Constitution in that the construction placed upon them by the New York courts deprives him of property rights vested in him by virtue of the Acts of 1874 as the only way in which the liens of the assessments could be made secure and paid was by a sale of lots for the full amount of the assessments. Upon that question it may well be that this court is not concluded by the decisions of the State courts. But in the view we take of this case, and for reasons which will be stated in a subsequent part of this opinion, we are not called upon to determine whether the statutes referred to are void as to this plaintiff as depriving him of his property without due process of law, or as impairing the obligation of the contract contrary to the provisions of the Constitution of the United States.

The plaintiff also claims:

4. That the Act of 1874 created a statutory or express trust in that it provided for an Improvement Fund out of which the certificates were to be paid, the Act imposing no liability to pay the certificates except out of that fund. We have seen that Section 6 of that Act, heretofore set forth, required that all moneys received by the treasurer of Long Island City in payment of the assessments or interest should be placed to the credit of the Improvement Fund

which was to consist of the amounts in the hands of the treasurer growing out of payments of the assessments and interest. This fund the statute required to be kept separate and apart from other moneys in his hands, and no part of the fund could be used except for payment of the certificates. The right of the certificate holders was therefore a right to have the fund properly collected and administered. The making of the assessments, the collection of the assessments and the maintenance and disbursement of the fund were duties specifically imposed upon the commissioners, assessors and treasurer of Long Island City. We are not disposed to question that this created a statutory trust for the benefit of the certificate holders. The Statute provided for the creation of a certain fund previously ascertained in amount to be raised by assessments upon certain property, and that the fund so established should be kept distinct and apart from any other moneys or funds, and should be applied to the sole purpose of the redemption of the certificates. There is thus provided a certain person (the treasurer of Long Island City) in whom is to be vested the legal title to a distinct and separate fund or res which is to be held for the beneficial use of certain persons (the certificate holders). There is a definite subject and an ascertained object. And where a specific property is directed to be collected and set apart and applied to a specific purpose equity

248 raises by implication an express trust to effectuate the intended object. The courts have decided so often as to make unnecessary the citation of authorities that one who receives money to be paid to another, or to be applied to a particular purpose is a trustee, and if he does not apply it he may be sued in equity for a breach of trust.

The complainant insists that while the city treasurer was made the recipient of the fund and charged with its collection and disbursement he took it as an officer of Long Island City or as its agent and that the trust was imposed upon the city in its corporate capacity.

The certificates which were issued were in form as follows:

"Improvement Certificate.*

\$—.

No. —.

State of New York.

LONG ISLAND CITY, January 6th, 187—.

This is to certify that Farwell, Sage & Co. or bearer is entitled to — dollars with interest thereon at the rate of 7 per cent. per annum, from the date hereof, payable out of the Improvement

*The following is a copy of the back of the certificate.

"This certificate is one of the Improvement Certificates in Long Island City issued under the provisions of the act within mentioned. It draws interest at the rate of 7 per cent. per annum and is receivable at par and accrued interest at any time in payment of any assessment laid under said act and of the accrued interest on such assessment.

ALLEN & CHARD.

The names signed were those of attorneys.

249 Fund in Long Island City, established under Chapter 326 of the Laws of New York, passed May 5th, 1874, entitled "An Act to provide for improvements in and adjoining the First Ward of Long Island City," this certificate being issued under the provisions of said act, and the said amount and interest being payable as provided therein.

P. G. VAN ALST,
WM. BRIDGE,
H. S. ANABLE,
Commissioners.

\$—.

Countersigned,

JOHN R. MORRIS,

Treasurer of Long Island City.

\$—.

\$—."

It will be observed that the certificate contains no promise to pay except out of an Improvement Fund, and that it is not issued by Long Island City although it is countersigned by the city treasurer. And it seems to be a matter of common knowledge that Long Island City at the time the Act of 1874 was passed was in an unfortunate financial condition. It has been described as being at that time "an impoverished, taxridden community." And it is quite easy to understand that the legislature intended to take the subject of these improvements out of the hands of the usual representatives of the city and lodge it in independent commissioners.

The defendant in strenuously denying that any trust was imposed upon the city gives as its reasons the following allegations of what it conceives to be the facts. That Long Island City as such was not authorized to issue the certificates involved or to make the improvements for the payment of which the certificates were issued, or to levy the assessments but that power was lodged in independent officers. That the city as such was not authorized to collect any of the assessments after they were levied or to foreclose the liens of the assessments by selling the properties but that power was vested in an independent officer, the city treasurer.

250 And defendant insists that no obligation was imposed in terms upon the city either to create or to maintain the Redemption Fund. And it insists further that Long Island City could not have been a trustee as under the terms of the statute it was not invested with title to the assessments and to the moneys which were received from the sale of the properties. The conclusion it deduces from the facts assumed is that no express trust, and no duty in the nature of a trust, and no power in trust was imposed upon the city for the benefit of the certificate holders.

But as we stated in an earlier part of this opinion that it was not necessary to determine whether certain officers were mere agents of the city or not, so for reasons about to be stated, it is not necessary now to say whether the trust which we think came into existence in connection with the issuance of the certificates was one imposed

upon the city in its corporate capacity, or simply upon the official whose duty it was to collect and disburse the fund.

The plaintiff also claims:

5. That in the sale of the lands for less than the amount of the assessments with interest, and in receiving in payment therefor certificates instead of the currency of the country, and in cancelling the assessments before payment in money had been made in full a gross breach of the trust was committed by reason of which the fund provided to be raised for the payment of the certificates under the terms of the Act of 1874 was never raised. He therefore asks that the trust be recognized and enforced, and that an accounting be had of the amounts that would have been received by Long Island City and its treasurer from the sale of the lands if the same had been sold for the full amount of the assessments with interest as required by the law as it stood when the certificates were issued, and that the amount due upon the certificates owned by him be ascertained and be decreed to be paid to him.

Admitting that a trust was imposed, and conceding for the purposes of the argument that the acts complained of amounted 251 to a breach of the trust there is no escape from the conclusion that they constituted an open, definite and final repudiation of the trust. For the result of the course taken was to make it impossible that a Redemption Fund should be obtained out of which payment of plaintiff's certificates could be made.

It is also apparent that this open and final repudiation of the trust was known to the plaintiff's agent in 1892. That agent testified that he had entire charge of all the plaintiff's interests in Long Island City at that time, and that he was present at the sales made in 1892 and protested verbally and in writing against the course the treasurer pursued and the specific acts now complained of, and that he was then told by that official that he should do exactly what was done. This repudiation of the trust then and there made to the agent thereby became the knowledge of the principal the plaintiff herein, for the knowledge of the agent is the knowledge of the principal, so that the plaintiff knew of the conduct complained of 17 years before the present suit was commenced. This in our opinion is the crucial fact in this case. This it is which makes it impossible for him to maintain this suit at this late day. This it is which makes it immaterial whether the trust was imposed upon the city or upon the city treasurer in his individual capacity. And this it is which made it unnecessary to consider whether the various persons engaged in these transactions acted as agents of the city or as independent officers.

Statutes of limitation do not run against express trusts until openly repudiated to the knowledge of the cestui. They do however begin to run at that time. Such is recognized to be the law in the courts of New York, *Zebley v. Farmers Loan and Trust Company*, 139 N. Y., 461. And in the courts of the United States, *New Orleans v. Warner*, 175 U. S., 120, 130. The principle is recognized generally throughout this country, as well as in England.

In the absence of any statute of limitations enacted by Congress

the Federal courts of equity usually follow the state statutes. And they do this even in actions which depend upon or arise 252 under the laws of the United States. *O'Sullivan v. Felix*, 233 U. S., 318, 322. The complainant is here asserting an equitable right, and it is true that as a general rule the equity jurisdiction of the United States is not affected by state laws. That principle cannot be invoked however to deprive a Federal equity court of the power to refuse relief to a suitor whose right is barred by a state statute of limitations. Such statutes are not binding upon Federal courts in suits in equity yet those courts may and generally do apply the statutes upon principles of analogy. And such statutes have been applied by these courts to claims against trustees. The Supreme Court said in *Wagner v. Baird*, 7 Howard, 233, 257 (1849) that "In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases: and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the limitations at law." Authorities to support the above statement are numerous and decisive. *Godden v. Kimmell*, 99 U. S., 201, 210. We think the action is barred under the New York statute, if not under the 6 years statute Code of Civil Procedure, sec. 382, then under the 10 years statute Code of Civil Procedure, sec. 388.

The treasurer's duty to collect the assessments by making sales of the property assessed was a duty which he was bound to perform under the Act of 1874 after the expiration of ten years from the filing of the assessment rolls. If he failed to perform it, or performed it improperly, a cause of action then accrued. In the case at bar the cause of action arose at the time the treasurer repudiated the obligation to create and maintain the Improvement Fund. After the sales of the assessed properties in 1892 and 1893 there was no property of any kind in the hands of the treasurer out of which payment of these certificates could be made, and no property out of which the redemption fund could be created.

But if no statute of limitations existed, either state or national, there would still be a reason why this suit would fail. It is a general principle of equity that stale claims ought not to be 253 encouraged. In *Sullivan v. Portland & Co.*, 94 U. S., 806, 811, Mr. Justice Swayne speaking for the Supreme Court said:

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case as it appears at the hearing is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes, the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no suitable bar. It is competent for the court to apply the inherent prin-

ciples of its own system of jurisprudence, and to decide accordingly."

In the instant case the plaintiff's acquiescence appears to have been absolute from 1892 to 1905 with the exception that he commenced a suit in June, 1893, to restrain the treasurer of Long Island City.

(a.) from receiving certificates from property owners; when redeeming their properties from the assessment sales; and

(b.) from marking upon the books, as paid, any assessment where the property was sold for less than the amount of the assessment.

He apparently never did anything more with the 1893 suit than to begin it. After 1905 there were negotiations with the city not upon a claim of right but of grace. Under the circumstances the plaintiff has not acted with reasonable diligence. And it is 254 a fundamental principle that nothing will call forth the aid of equity but conscience, good faith and reasonable diligence. If during this period there had been persistent and immediate litigation which had failed because of some misapprehension as to the remedy available, and upon the failure this suit had been commenced there would have been some ground for the claim that the laches at least were excusable. As it is there is none.

For the reasons stated it is the judgment of this court that the bill was properly dismissed.

Decree affirmed.

HOUGH, C. J.:

I concur on the ground that Plaintiff's claim is stale.

255 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 16th day of August, one thousand nine hundred and seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

ELIAS C. BENEDICT, Complainant-Appellant,

v.

CITY OF NEW YORK, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.

256 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. E. C. Benedict v. City of N. Y. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 20, 1917. William Parkin, Clerk.

257 At a Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Post Office Building in the Borough of Manhattan, City, County and State of New York, on the 12th day of November, 1917.

Present: Hon. Henry Wade Rogers, U. S. Circuit Judge.

ELIAS C. BENEDICT, Appellant,
against

THE CITY OF NEW YORK, Appellee.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed.

HENRY WADE ROGERS,
United States Circuit Judge, Second Circuit.

258 United States Circuit Court of Appeals for the Second Circuit.

ELIAS C. BENEDICT, Appellant,
against

THE CITY OF NEW YORK, Appellee.

The above named appellant, Elias C. Benedict, respectfully shows that the above entitled cause is now pending in the United States District Court of Appeals for the Second Circuit, and that a judgment therein has been rendered on the 16 day of August, 1917, affirming the decree of the United States District Court for the Southern District of New York; that the matter in controversy in said suit exceeds One Thousand (\$1,000) Dollars, besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause, with all things concerning the same,

to the Supreme Court of the United States in order that the errors complained of in the assignment of errors filed herewith by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

REED, McCOOK AND HOYT,
Solicitors for Appellant, 15 William Street, New York City.

CHARLES K. ALLEN,
Of Counsel.

259 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Elias C. Benedict, Plaintiff-Appellant, against The City of New York, Defendant-Appellee. Petition and Order. Reed, McCook & Hoyt, Attorneys for Plaintiff-Appellant, 15 William Street, Manhattan, New York. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 13, 1917. William Parkin, Clerk.

260 United States Circuit Court of Appeals for the Second Circuit.

ELIAS C. BENEDICT, Complainant-Appellant,

against

THE CITY OF NEW YORK, Defendant-Appellee.

Now comes the Complainant-Appellant and files the following assignment of errors upon which he will rely upon his appeal from the decree made by this Honorable Court on the 16th day of August, 1917, in the above entitled cause.

First. That the Circuit Court of Appeals erred in affirming the decree of the District Court dismissing the bill of complaint.

Second. That the Circuit Court of Appeals erred in not reversing the decree of the District Court with instructions to enter a decree in favor of the complainant.

Third. That the Circuit Court of Appeals erred in decreeing that the Complainant was not entitled to the relief prayed for in the bill of complaint and in not decreeing that he was so entitled.

Fourth. That the Circuit Court of Appeals erred in ruling, by implication only, that the decision of the Court of Appeals of New York in Nelson v. Bleckwenn, 137 N. Y. 556, which affirmed without opinion the judgment of the General Term of the Supreme Court of the State of New York for the Second Department, was not conclusive upon it; and the said Circuit Court of Appeals

261 erred in not directly ruling that the decisions of the Court of Appeals of the State of New York were not conclusive upon it, in so far as they construed Chapter 501 of the Laws of 1879 of the State of New York and Chapter 656 of the Laws of 1886 of the State of New York to grant to Long Island City, through its City Treasurer and Collector of Taxes or to said City Treasurer and Collector of Taxes of Long Island City, the right to accept First Ward Long

Island City Improvement Certificates issued under Chapter 326 of the Laws of 1874 in payment of the purchase price of land sold; and in so far as said decisions purported to hold that said City, or the said City Treasurer and Receiver of Taxes, had a right to sell lands assessed under said Chapter 326 of the Laws of 1874 for less than the amount of the assessments thereon.

Fifth. That the Circuit Court of Appeals erred in not holding, except by implication only, that the said Chapter 501 of the Laws of 1879 of the State of New York, was unconstitutional and null and void and in violation of the provisions of Article 1, Section 11, Clause 1 of the Constitution of the United States and in violation of Section 1, of the 14th Amendment to said Constitution, in so far as said Act purported to give purchasers at the assessment sales of lands assessed pursuant to said Chapter 326 of the Laws of 1874, the right to use said Improvement Certificates of Long Island City in payment of lands purchased by them at said sales, and to give the right to, and create the duty upon, said Long Island City through its City Treasurer and Receiver of Taxes and said City Treasurer and Receiver of Taxes of Long Island City, to receive them in payment; and said Circuit Court of Appeals erred in not holding directly that said Chapter 501 of the Laws of 1879 was unconstitutional and null and void and in violation of the Constitution of the United States for the reasons herein set forth.

262 Sixth. That the Circuit Court of Appeals erred in not holding, except by implication only, that the said Chapter 656 of the Laws of 1886 was unconstitutional and null and void and in violation of the provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States and of Section 1 of the 14th Amendment to said Constitution, in so far as said Act purported to give purchasers at the assessment sales of lands assessed pursuant to said Chapter 326 of the Laws of 1874, the right, and to create a duty upon and give the right to said City of Long Island City through its City Treasurer and Receiver of Taxes to sell said lands for less than the full amount of the assessment, interest, percentages and expenses thereon; and said Circuit Court of Appeals erred in not holding directly that said Chapter 656 of the Laws of 1886 was unconstitutional and null and void *in and* violation of the Constitution of the United States for the reasons herein set forth.

Seventh. That the Circuit Court of Appeals erred in holding that the bill of complaint and the rights of the complainant were barred by any statute of limitations.

Eighth. That the Circuit Court of Appeals erred in holding that the bill of complaint and the rights of the complainant were barred by laches.

Ninth. That the Circuit Court of Appeals erred in holding that laches existed on the part of the complainant.

Tenth. That the Circuit Court of Appeals erred in holding that, in the absence of any statute of limitation enacted by Congress, the Federal Courts of Equity usually followed the State statute of limitations.

263 Eleventh. That the Circuit Court of Appeals erred in holding that State statutes of limitations generally apply, upon principles of analogy, to suits in equity in the Federal Courts.

Twelfth. That the Circuit Court of Appeals erred in holding that the right of the Complainant was barred under Section 382 of the New York Code of Civil Procedure, providing a six years statute of limitations; and that if not barred thereunder his said rights were barred under Section 388 of the New York Code of Civil Procedure, providing a ten years statute of limitations.

Thirteenth. That the Circuit Court of Appeals erred in holding by implication that the only cause of action against the City of Long Island City arose at the time the City Treasurer and Receiver of Taxes of Long Island City sold the lands assessed under Chapter 326 of the Laws of 1874, in an unlawful manner in 1892 and 1893.

Fourteenth. That the Circuit Court of Appeals erred in holding that Complainant acquiesced absolutely from 1892 to 1905 in the City of Long Island City's breach of the trust duties, imposed on it by said Chapter 326 of the Laws of 1874, with the exception of the commencement by Complainant of a suit in June, 1893.

Fifteenth. That the Circuit Court of Appeals erred in holding that the negotiations by the Complainant with the City of New York after 1905 were not upon a claim of right but a claim of grace.

Sixteenth. That the Circuit Court of Appeals erred in holding that the complainant had not acted with reasonable diligence.

Seventeenth. That the Circuit Court of Appeals erred in holding, by implication, that the alleged laches of Complainant was inexcusable.

Eighteenth. That the Circuit Court of Appeals erred in holding that the time occupied by Complainant in negotiating with defendant and its predecessor the City of Long Island City, for a settlement of his said claim, was not an excuse for delay in starting the within action, to the extent that time was bona fide occupied by him in said negotiations.

Nineteenth. That the Circuit Court of Appeals erred in holding that the drafting of Chapter 686 of the Laws of 1904 of the State of New York by the Complainant's then attorney with the co-operation and approval of the attorney for the defendant, the enactment of said Chapter 686 of the Laws of 1904, its acceptance by the defendant, the filing by Complainant with the defendant of a petition thereunder, the negotiations by Complainant with the defendant thereupon, the pendency of said petition before the defendant unrejected by defendant, and the conduct of defendant's agents with the intention to cause the Complainant to believe, and the belief therein of Complainant that said petition would be acted upon, did not toll the running of the statute of limitations, if the same had already begun to run, and did not toll any laches of Complainant if any theretofore existed, and did not excuse the Complainant's delay in beginning the present action.

Twentieth. That the Circuit Court of Appeals erred in holding, by implication, that the sale by the City of Long Island City, through its City Treasurer and Receiver of Taxes, of the lands assessed under

said Chapter 326 of the Laws of 1874, for less than the amount of the assessment, interest, percentage and expenses, was the final execution by it of the trust duties imposed by *it of the trust duties imposed by said Act upon said City of Long Island City and its said City Treasurer and Receiver of Taxes.*

Twenty-first. That the Circuit Court of Appeals erred in holding, by implication only, and not directly, that the City of Long Island City had no right under the statutes of the State of New York to sell the lands assessed under said Chapter 326 of the Laws of 1874 for less than the amount of the assessment, interest, percentage, and expenses, or to receive, from the purchasers at said sales, Improvement Certificates issued under said Chapter 326 of the Laws of 1874, in payment, and that the purchasers had no right to use said certificates in payment; and said Court erred in not holding that Chapter 586 of the Laws of 1886, if it gave such right, was unconstitutional and null and void, and in violation of aforesaid provisions of the Constitution of the United States and the amendments thereto, in so far as said statute was in conflict with the rights of complainant, a holder of said improvement certificates issued prior thereto under said Chapter 326 of the Laws of 1874.

Twenty-second. That the Circuit Court of Appeals erred in holding that the breach of trust of the City of Long Island City through its City Treasurer and Receiver of Taxes in selling the lands so assessed for less than the amount of the assessment, interest, percentage and expenses, was a repudiation of its trust duties under said Chapter 326 of the Laws of 1874. That the said Court erred in holding, by implication, that the trust relationship existing between the City of Long Island City through its said City Treasurer and Receiver of Taxes, and the holder of improvement certificates terminated upon said sale being so made by said official.

Twenty-third. That the Circuit Court of Appeals erred in not holding that there were trust duties under said Chapter 326 of the Laws of 1874 still remaining to be performed by said City of Long Island City through its City Treasurer and Receiver of Taxes and by said City Treasurer and Receiver of Taxes, for the benefit of the holders of Improvement Certificates issued under said Chapter 326 of the Laws of 1874, and to others, after the said City of Long Island City through its said City Treasurer and Receiver of Taxes and said City Treasurer and Receiver of Taxes had sold said lands so assessed under Chapter 326 of the Laws of 1874 for less than the amount of the assessment, interest, percentage and expenses.

Twenty-fourth. That the Circuit Court of Appeals erred in not holding directly, but only by implication, that the sale by the City of Long Island City through its City Treasurer and Receiver of Taxes and by said City Treasurer and Receiver of Taxes, of lands assessed under Chapter 326 of the Laws of 1874 and thereafter sold under Chapter 586 of the Laws of 1886, for less than the amount of the assessment, interest, percentage and expenses, receiving said Improvement Certificates in payment, was in violation of the complainant's rights under Chapter 461, Title 6, Section 23, of the Laws of 1871 of the State of New York which was in force at the time said

Improvement Certificates held by complainant were issued and acquired by him, and which section of said Act of 1871 provided that all sales for taxes should be made for the shortest period for which any purchaser would take the premises and pay the taxes or assessment, interest, percentage and expenses.

Twenty-fifth. As Chapter 326 of the Laws of 1874 of the State of New York in Sections 7 and 9 provides that all improvement certificates received by the City Treasurer and Collector of Taxes in payment of assessments or interest should be cancelled, and as Chapter 501 of the Laws of 1879 of the State of New York in Section 10 provides that any improvement certificates used by the purchaser at an assessment sale in payment of the purchase price of the lands sold should be permanently cancelled and defaced by the said City Treasurer and Collector of Taxes and said official did not cancel said improvement certificates received in payment of the assessment but subsequently delivered the same to purchasers at assessment sales, the owner of the certificates of sale; which made it possible for the improvement certificates thus delivered to said purchasers to be sold, destroying the demand therefor and market value thereof; the Circuit Court of Appeals erred in not holding that such delivery of said improvement certificates to said purchaser instead of cash was an unconstitutional act and in violation of the rights of the owners of improvement certificates under the aforesaid provisions of the Constitution of the United States; and said Circuit Court of Appeals also erred in not holding such delivery of said improvement certificates to said purchaser was a recognition of the trust relationship still existing between said City and the owner of improvement certificates, although a violation thereof, by reason of which the prior unlawful sales for less than the amount of the assessments could not have been a repudiation of the trust relationship.

Twenty-sixth. That the Circuit Court of Appeals erred in not holding that the appellant was, under the facts set out in the complaint and proven by him at the trial, entitled to the relief prayed for in the complaint.

REED, McCOOK & HOYT,
Solicitors for Complainant-Appellant,
15 William Street, New York City.

269 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Elias C. Benedict, Plaintiff-Appellant, against The City of New York, Defendant-Appellee. Assignment of Errors. Reed, McCook & Hoyt, Attorneys for Plaintiff-Appellant, 15 William Street, Manhattan, New York. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 13, 1917. William Parkin, Clerk.

270 United States District Court of Appeals, Second Circuit,

ELIAS C. BENEDICT, Complainant-Appellant,
against

CITY OF NEW YORK, Defendant-Appellee.

Know all men by these presents, that Elias E. Benedict, as principal, and National Surety Company, a corporation of No. 115 Broadway, New York, New York, as surety, are held and firmly bound unto the above named City of New York, in the sum of Five Hundred (\$500.00) Dollars, to be paid to the said City of New York, for the payment well and truly to be made, the said National Surety Company, bind itself, its successors and assigns, firmly by these presents.

Sealed with our seal and dated this 11th day of September, 1917.

Whereas, the Appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the District Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such, that if the said Elias C. Benedict, appellant, shall prosecute said appeal to effect and answer all damages and costs if he fails to make said appeal good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] ELIAS C. BENEDICT,
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:

E. M. McCARTHY,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss.

On this 17th day of September, 1917, before me personally came the above named Elias C. Benedict, to me known, and known to me to be the individual described in and who executed the within bond and he acknowledged that he executed the same.

[SEAL.] GUSTAVUS MAYER,
Notary Public, New York County, No. 77, Reg. No. 9051.

My commission expires March 30, 1919.

271

National Surety Company.

Capital \$4,000,000.00

*Affidavit, Acknowledgment, and Justification by Guarantee or
Surety Company.*

STATE OF NEW YORK,
County of New York, ss.:

On this 11th day of September one thousand nine hundred and seventeen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Elias C. Benedict as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Elias C. Benedict is the corporate seal of said National Surety Company, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of said resident subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Eight Million (\$8,000,000) Dollars.

That — — — is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON.
(Deponent's Signature)

Sworn to, acknowledged before me, and subscribed in my presence this 11th day of September, 1917.

H. E. EMMETT,
Notary Public, etc.

(Officer's Signature, description and seal.)

272 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Elias B. Benedict, Appellant, v. The City of New

[SEAL.]

York, Appellee. Bond, Reed, McCook & Hoyt, Attys. for Appellant, 15 William St., N. Y. C. Approved. Henry Wade Rogers, U. S. Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 13, 1917. William Parkin, Clerk.

273 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 272, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Elias C. Benedict against City of New York, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of November, in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-second.

[SEAL.]

WM. PARKIN, Clerk.

274 By The Honorable Henry Wade Rogers, One of the Judges
of the United States Circuit Court of Appeals for the
Second Circuit,

To The City of New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the City of Washington, D. C., on the 12th day of December, 1917, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein Elias C. Benedict, is appellant and you are respondent to show cause, if any they- be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 12th day of November, in the year of our Lord One Thousand Nine Hundred and seventeen, and of the Independence of the United States the One Hundred and Forty-first.

HENRY WADE ROGERS,
Judge of the Circuit Court of Appeals for the Second Circuit.

275 [Endorsed:] United States Supreme Court. 5946. Elias C. Benedict, Appellant, against The City of New York, Defendant. Citation. Reed, McCook & Hoyt, Attorneys for Appellant, 15

William Street, Manhattan, New York. A copy of the within paper has been this day received at the Office of the Corporation Counsel, Nov. 13, 1917, Lamar Hardy, Corporation Counsel. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1917. William Parkin, Clerk.

Endorsed on cover: File No. 26,256. U. S. Circuit Court Appeals, 2d Circuit. Term No. 789. Elias C. Benedict, appellant, vs. The City of New York. Filed December 15th, 1917. File No. 26,256.

To be argued by

CHARLES K. ALLEN and Court, U. S.
LEON ABBETT. FILED

MAR 8 1919

JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917. No. [redacted]

315

ELIAS C. BENEDICT,

Complainant-Appellant,

against

THE CITY OF NEW YORK,

Defendant-Appellee.

Brief of Complainant-Appellant.

REED, McCook & Hoyt,

Solicitors for Complainant-Appellant,

15 William Street,

New York City.

CHARLES K. ALLEN,
LEON ABBETT,

Of Counsel.



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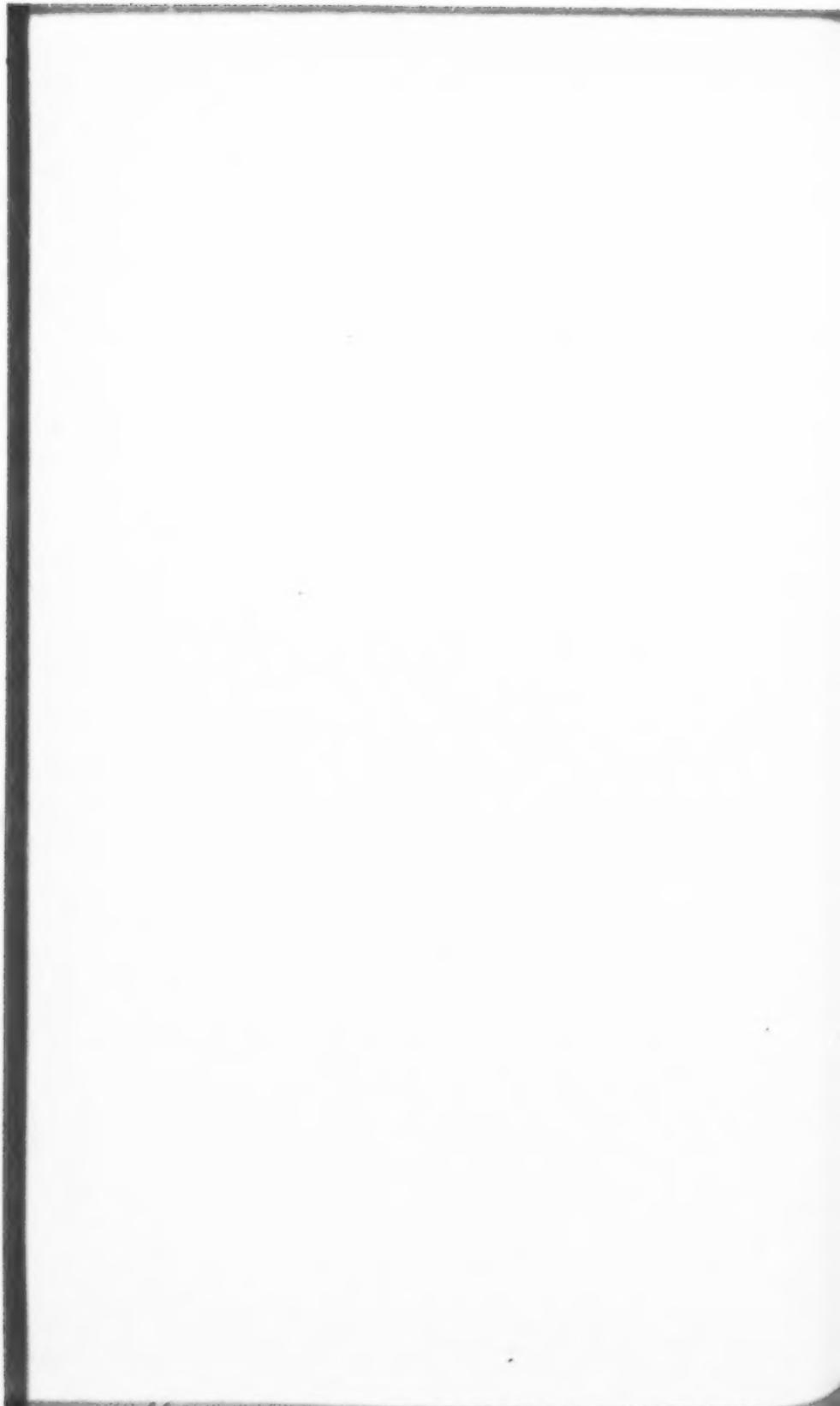
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To be Argued by
Charles K. Allen and
Leon Abbott.

Supreme Court of the United States

ELIAS C. BENEDICT,
Complainant-Appellant,
against
THE CITY OF NEW YORK,
Defendant-Respondent.

Brief for Com-
plainant-Ap-
pellant.
Oct. Term,
1917.
No. 789.

Statement.

This is a bill by a *cestui que* trust against a trustee for an accounting.

The facts as alleged in the Bill of Complaint and established by the proof are briefly stated, as follows: The complainant, a resident of Greenwich, Conn. (Test., Tr. Rec., p. 35), has been since before 1879 (Test., Tr. Rec., pp. 36, 37), the owner and holder for value of certain certificates of the par value of \$8,000 bearing 7 per cent interest (Test., Tr. Rec., p. 35), issued under the auspices of Long Island City (Test., Tr. Rec., p. 36), to a certain firm of contractors, Farwell, Sage & Co., for certain street opening improvements and services rendered under contract for the benefit of said city pursuant to Chap. 326 of the Laws of New York of 1874 (Test., Tr. Rec., pp. 36, *et seq.*), and subsequently assigned to the complainant for his share of moneys advanced by Benedict, Fowler & Co., of which he was a member, to fi-

nance Farwell, Sage & Co. for its said improvement work (Test., Tr. Rec., pp. 36, *et seq.*).

These certificates, part of a total issue of \$1,847,-500 (par. 6 in Compl., Tr. Rec., p. 8), have never been paid (Test., Tr. Rec., pp. 37, 44; Ex. II, Test., Tr. Rec., pp. 66-67 and 76), though the complainant has duly made demand and taken various steps by negotiation and litigation for their collection (Test., Tr. Rec., pp. 56, *et seq.*, Injunction of Hon. Charles L. Benedict, N. S. D. J. of June 30, 1893; Ex. JJ, Tr. Rec., p. 114; Exs. C, D, E, F, G, H, pp. 97, *et seq.*; R. R., p. 120), and it appears that in various cases it has been judicially held by various courts of the State of New York that no direct *legal obligation as distinguished from equitable obligation* rested on Long Island City or its successors *to pay* these certificates. The present defendant is the successor in interest, benefit and obligation herein of Long Island City (Deft's Charter, 1901, T. Rec., pp. 21 and 2).

The complaint shows and maintains that by a proper construction of Chap. 326, Laws of New York, 1874, under which the certificates were issued as above stated, a *trust fund* for the redemption of the certificates was provided for, to be created, set apart and maintained by laying and collecting assessments against properties benefited by the improvement work authorized (approved by both Courts), and that the trust to collect and maintain the fund was imposed upon the municipality of Long Island City, as trustee, by virtue of various functions imposed upon several city officials as such (par. 5th, Compl., Tr. Rec., pp. 2, *et seq.*); that the City through its officers accepted the trust and received its benefits (pars. 6 and 7, Compl., Tr. Rec., pp. 2 *et seq.*; Test., Tr. Rec., pp. 36, 37, 87 *et seq.*, and par. 3rd of Compl., p. 2).

The trustee, Long Island City, committed breaches of the trust, resulting in the practical destruction of the value of the certificates, in that through its Treasurer, in spite of protest, it permitted and authorized sales of lands against which assessments had been laid, for less than the assessment in very numerous instances, in violation of the Act of 1874 (pars. 17th and 18th, Compl., Tr. Rec., p. 18, *et seq.*; Test., p. 123; Ex. II; Test., pp. 80 and 44); and further committed breaches of trust in *reissuing certificates received in payment of the assessment and of the purchase price at the sale, instead of cancelling the same* (Comp., par. 16, Tr. Rec., p. 17; Test., pp. 43, 74), resulting in their becoming a drug on the market; and *in allowing redemption at par in certificates where sales had been made for less than the amount of the assessments* (Tr. Rec., p. 74); the resulting deficit therefrom amounting, with interest, to approximately \$1,000,000; by which the certificates became valueless (Compl., par. 18, Tr. Rec., p. 37; Test., pp. 44, 45, 47, 50, 70, 71, 80, 81). The City, through its Treasurer, claimed to justify its action under Chap. 656, Laws N. Y., 1886, permitting ~~for~~ sales for less than amount of assessments; but complainant maintains that this Act did not authorize assessment sales at less than the face of the assessments or the issue of certificates received in payment; and that no law whatever justified the City in receiving anything else than cash in case of the redemption of lands sold for the nonpayment of the assessment of 1874; or if so construed it was unconstitutional as impairing the previously created contract rights of certificate holders (pars. 8-14, Compl., Tr. Rec., pp. 8, *et seq.*; opinion Judge Hand, p. 128, and of Circuit Court of appeals, p. 147).

7. Several closely related questions are presented for determination:

1. Was a trust to create and maintain a fund for the redemption of the improvement certificates imposed upon Long Island City by the Act of 1874 for the due administration of which Long Island City's successor must account? (Answered directly in the affirmative by the Circuit Court of Appeals, Tr. Rec., pp. 148, 150: "We are not disposed to question that this created a statutory trust for the benefit of the certificate holders," and impliedly by the District Court, Compl., Tr. Rec., p. 129.)
2. Has the complainant shown breaches of trust destructive of the trust fund and therefore making its restoration incumbent on defendant? (Answered by the Courts, as in question 1, *supra*.)
3. Did such breach of trust amount to a *repudiation* of the trust? (Answered by the Courts as in question 1.)
4. Have complainant's rights been barred or lost by the Statute of Limitations or by laches? (Answered in the affirmative by the lower Courts.)
5. Did the Federal Court have jurisdiction? (Answered in the affirmative by the Circuit Court of Appeals, Tr. Rec., p. 143.)
6. Were these duties imposed on Long Island City (through its officers and agents)? (Not passed upon by the lower Courts, Tr. Rec., p. 146.)
7. Were complainant's constitutional rights violated? (Not decided by the Circuit Court of Appeals, Tr. Rec., p. 147, but the District Court thought a "genuine question of constitutionality" was raised, Tr. Rec., p. 128.)
8. Were the decisions of the state courts binding on the Federal Courts? (The Circuit Court of Appeals felt it was not so concluded, Tr. Rec., p. 147.)

Assignment of Errors.

The following summary of the assignment of errors of the Circuit Court of Appeals was properly filed (Tr. Rec., p. 154) :

1. In affirming the decrees of District Court in dismissing the appeal.
2. In not reversing the decree of the District Court with instructions to enter a decree in favor of complainant.
3. In decreeing the complainant was not entitled to the relief prayed for and in not decreeing that he was so entitled. In its ruling, by implication only, that the judgment of the Court of Appeals of New York, in *Nelson v. Bleckwenn*, 137 N. Y. 556, was not conclusive upon it and in not directly ruling that the decisions of the Court of Appeals of New York were not conclusive upon it, insofar as they construed Chapter 501 of the Laws of New York, of 1879, and Chapter 656 of the Laws of New York, of 1886, as granting to Long Island City through its City Treasurer and Receiver of Taxes or to said official, the right to accept First Ward, Long Island City improvement certificates issued under Chapter 326 of the Laws of New York, of 1874, in payment of the purchase price of the land sold and insofar as said decision purported to hold that said City or said official had a right to sell lands, assessed under said Laws of 1874, for less than the amount of the assessments thereon.
4. In not ruling, except by implication only, that Chapter 501 of the Laws of New York of 1879 was unconstitutional, null and void and in violation of article 1, section 1, clause 1, of the Constitution of the United States, and of section 1 of the Fourteenth Amendment thereto, insofar as said Act purported to

give purchasers at assessment sales of lands assessed pursuant to Chapter 326 of the Laws of 1874, the right to use improvement certificates of Long Island City, in payment of lands purchased by them at said sales, and to give the right to, and create the duty upon Long Island City through its City Treasurer and Receiver of Taxes and said official, to receive them in payment; and in not ruling *directly* that said Chapter 501 of the Laws of 1879 was unconstitutional, null and void and in violation of the United States Constitution for the reasons set forth.

5. In not ruling, except by implication only, that Chapter 656 of the Laws of New York, of 1886, was unconstitutional, null and void, and in violation of article 1, section 10, clause 1, of the United States Constitution and section one of the Fourteenth Amendment thereto, insofar as said Act purported to give a purchaser at assessment sales of lands assessed pursuant to Chapter 326 of the Laws of 1874, the right to buy, and decreed the duty upon and gave the right to said Long Island City, through its City Treasurer and Receiver of Taxes, to sell said lands, for less than the amount of the assessments thereon; and in not ruling *directly* that said Chapter 656 of the Laws of 1886 was unconstitutional, null and void and in violation of the United States Constitution for the reasons set forth.

6. In ruling that the bill of complaint and the rights of the complainant were barred by any statute of limitations.

7. In holding that the bill of complaint and the rights of the complainant were barred by laches.

8. In ruling that laches existed on the part of the complainant.

9. In ruling that in the absence of any statute of limitations enacted by Congress, the Federal Courts in equity usually follow State statutes of limitations.
10. In ruling that State statutes of limitations applied upon principles of analogy to suits of inequity in the Federal Courts.
11. By holding that the complainant's rights were barred by the six years statute of limitations contained in Section 382 of the New York Code of Civil Procedure; but that if not so barred, his rights were barred under the ten year statute of limitations contained in section 388 of said Code.
12. In holding by implication that the only cause of action against Long Island City arose *at the time* its City Treasurer and Receiver of Taxes sold in 1892 and 1893 land assessed under Chapter 326 of the Laws of New York, of 1874.
13. In holding that complainant acquiesced absolutely from 1892 to 1905 in Long Island City's breach of the trust duties imposed on it by Chapter 326 of the Laws of 1874, with the exception of the commencement by complainant of a suit in June 1893.
14. In holding that the negotiations by complainant with the City of New York, after 1905, were not upon a claim of right, but a claim of grace.
15. In holding that complainant did not act with reasonable diligence in beginning the pending action.
16. In holding by implication that the alleged laches of complainant was inexcusable.
17. In holding that the time occupied by complainant in negotiating with defendant and its predecessor, Long Island City, for a settlement of his claim was not an excuse for his delay in starting the pending

action, to the extent that such time was *bona fide* occupied by him in said negotiations.

18. In holding that the drafting of Chapter 686, of the Laws of New York, 1904, by complainant's then attorney, with the co-operation and approval of defendant's attorney, the enactment of said Act, its acceptance by the defendant, the filing by complainant with defendant of a petition thereunder, the negotiations by complainant with defendant thereupon, the pendency of such petition with the defendant unrejected by it, and the conduct of defendant's agents with the intention of causing complainant to believe and his actual belief that said petition would be acted upon, did not toll the running of the statute of limitations, if the same had already begun to run and did not toll any laches of complainant, if any theretofore existed, and did not excuse complainant's delay in beginning the pending action.

19. In holding by implication that the sale by Long Island City through its City Treasurer and Receiver of Taxes of the land assessed under Chapter 326 of the Laws of New York of 1874, for less than the amount of assessment, was the final execution by it of the trust duties imposed upon it and its said official by said Act.

20. In holding, by implication only and *not directly*, that Long Island City had no right under the statutes of New York to sell the lands assessed under Chapter 326 of the Laws of 1874, for less than the amount of the assessment, or to receive, from the purchasers, at said sales, improvement certificates issued under the said Act in payment, and that the purchasers had no right to use said certificates in payment; and in not holding that Chapter 586 of the Laws of New York of 1886, if it gave such right was unconstitutional.

tional, null and void, in violation of aforesaid provisions of the United States Constitution and of the Amendments thereto, insofar as said statute was in conflict with the rights of defendant, the holder of improvement certificates issued prior thereto under Chapter 326 of the Laws of New York, of 1874.

21. In holding that the breach of trust of Long Island City through its City Treasurer and Receiver of Taxes in selling the land so assessed for less than the amount of the assessments, was a repudiation of its trust duties under Chapter 326 of the Laws of 1874; and in holding by implication that the trust relationship existing between said City, through its said official, and the holder of said improvement certificates terminated upon said sale being so made.

20. In not holding that there were trust duties under Chapter 326 of the Laws of New York, of 1874, still remaining to be performed by Long Island City through its said Treasurer and Receiver of Taxes, and by said official for the benefit of the holders of improvement certificates issued under Chapter 326 of the Laws of 1874 and to others, *after* said City, through said official and said official had sold said land so assessed under said Act for less than the amount of the assessments.

23. In not holding directly, but only by implication, that the sale by said City, through its said official and by said official, of lands assessed under Chapter 326 of the Laws of 1874, and thereafter sold under Chapter 656 of the Laws of 1886, for less than the amount of assessment, receiving improvement certificates in payment, was in violation of complainant's rights under Chapter 461, title 6, section 23 of the Laws of New York, of 1871, which was in force at the time the improvement certificates held by com-

plainant were issued and acquired by him and which said act of 1871 provided that all sales should be made for the shortest period for which any purchaser would take the premises sold *and* pay the tax or assessments thereon.

24. Inasmuch as Chapter 326 of the Laws of New York, 1874 (Sects. 7 and 9), provided that all improvement certificates received by the City in payment of assessments should be cancelled, and Chapter 501 of the Laws of New York of 1879 (Section 10), provided that any improvement certificates used by the purchaser at an assessment sale in payment of the purchase price of lands sold, should be permanently cancelled and defaced by said official, and said official did not cancel said improvement certificates received in payment of the assessment and purchase price, but subsequently delivered the same for future negotiation, making it possible for the improvement certificate thus delivered to be reissued, destroying a demand therefor, and market value thereof; the Court erred in not holding that such delivery of said certificates was an unconstitutional act and a violation of the rights of the owners of improvement certificates, under the aforesaid provisions of the United States Constitution; and said Court also erred in not holding such delivery by Long Island City of said certificates was a recognition of the trust relationship still existing between said City and the owner of improvement certificates by reason of which the prior unlawful assessment sales for less than the amount of the assessment could not have been a *repudiation of the trust relationship*.

25. In not holding that complainant was under the facts set forth in the complaint and proved by him at the trial, entitled to the relief prayed for in the complaint.

The District Court while recognizing that a trust relationship was created decided against complainant on the ground of laches or statute limitations (Tr. Rec., p. 128). The Circuit Court of Appeals took the same view (Tr. Rec., pp. 142, *et seq.*). Under Point 1 of this brief we believe we have demonstrated satisfactorily that the state statute of limitations did not apply or that if it did apply it was tolled by subsequent events and that there was no sufficient laches to preclude relief to complainant—the testimony showing that the period of inactivity of the complainant was at most eight years, not sufficient to bar relief in the case of an express trust.

Table of Dates.

Apr. 13, 1871—Charter L. I. City—requires sale for amount of taxes, etc.

May 5, 1874—Act under which certificates of indebtedness issued.

Oct. 1, 1877, to June 9, 1879—Dates between which certificates weren't issued.

June 11, 1879—Act protecting assessment lien, allowing use of certificates for purchase, but requiring their cancellation.

June 15, 1886—Act under which lands assessed were sold.

1888—Continuing sales for *full* amount of assessments.

Feb. 11, 1891—*Oakley v. Bleckwenn* (General Term)—holds valid acceptance of certificates on sale of land.

Apr. 28, 1891—*Oakley v. Bleckwenn* (Ct. of Appeals)—holds valid acceptance of certificates on sale of land.

1892-1893—First sales for less than amounts of assessments.

Feb. 19, 1893—*Nelson v. Bleckwenn* (Ct. of Appeals).

June 30, 1893—*Benedict v. Bleckwenn*—injunction U. S. District Court.

1901-1903—Attorney for complainant with co-operation of Corporation Counsel, introduced bills in Legislature, providing for payment of certificates of indebtedness.

May 9, 1904—Act allowing payment “accepted by City.”

Feb. 21, 1905—Petition filed with Comptroller under above.

May 27, 1905—Continuing redemptions by City, from that date to July 10, 1913.

May 26, 1909—Letter of attorney for complainant to Comptroller.

1910—Letters of attorneys for plaintiff to Comptroller demanding payment.

May 27, 1910—Settlement declined by Comptroller—first repudiation.

July, 1910 (about)—Within suit in equity begun.

POINT 1.

The trust herein imposed upon the City to collect and administer the fund to pay the improvement certificates being an express trust, and a continuing one, the Statute of Limitations does not apply, and though several years elapsed before bringing suit, the complainant has not been guilty of laches.

(A) THE ATTITUDE OF THE CIRCUIT COURT OF APPEALS.

As the Circuit Court of Appeals based its decision against Appellant solely upon the ground of the statute of limitations or laches, we take the liberty of quoting certain statements in its opinion, believing that this Court will readily see, in the light of the cases hereafter cited, the error into which it fell.

(Tr. Rec. p. 150.) Speaking of the improper sales, it said:

“this *repudiation* of the trust then and there made to the agent, thereby became the knowledge of the principal the plaintiff herein, for the knowledge of the agent is the knowledge of the principal, so that the plaintiff knew of the conduct complained of 17 years before the present suit was commenced. *This in our opinion is the crucial fact in the case.* This it is which makes it impossible for him to maintain this suit at this late day.”

We respectfully submit that the error in this statement is based upon the assumption that the mere

breach in 1892-3 constituted a *repudiation*, totally overlooking or ignoring the other trust duties subsequently to be performed, precluding a *repudiation of the trust relationship*; and totally overlooking the authorities hereafter cited which clearly show that even if there had been 17 years' period of delay (which there was not), such delay would not be prohibitive in the case of an express trust. But as a matter of fact the delay was at most 8 years from 1893 when the improper sales were concluded to 1901, when steps were taken by Appellant's then attorney with the co-operation of the Corporation Counsel of New York City to draft an act which when passed was to, and did, provide for the payment by the City of the certificates.

(Tr. Rec. p. 151) :

"that principle (referring to the rule that the equity jurisdiction of the United States Courts is not affected by State laws) cannot be, however, to deprive a Federal equity court of the power to refuse relief to a suitor whose right is barred by a state statute of limitations."

(Tr. Rec. same page) :

"We think the action is barred under the New York statute, if not under the 6 years' statute Code of Civil Procedure, Sec. 382, then under the 10 years' statute Code of Civil Procedure, Sec. 388."

The learned Court of Appeals was in error here, for it assumed that the obligation of the principle just referred to would not be applicable to the present case if the Appellant's right was barred by the State statute of limitations. In the first place, the rule that the equity jurisdiction of the United States is not affected by said laws is a rule (where the equitable rights of a suitor have been interfered with), superior to the desirability in general of following the statute of

a State, for in an equity case the equities of a suitor are great, the Federal Courts will never follow a State statute of limitations, to his detriment; secondly, the claim of complainant was not as a matter of fact barred by any State statute. We have pointed out citing authorities on page 67 *et seq.* herein, that neither the 6 nor the 10-year statutes could have applied as the trust was a continuing one (*Ford v. Clendenin*, 215 N. Y. 10, 16); and at page 69 that the 6-year statute of limitations could not apply because this action is one not to enforce a statutory right nor is it brought under any statute—the action being one in equity to enforce a trust and for an accounting based on the wrongful acts of the defendant and its predecessor in violation of vested rights the Appellant had protected and guaranteed by the Federal Constitution—*Clark v. Water Commissioners of Amsterdam*, 148 N. Y. 1, being conclusively on this point, and finally that the 10-year statute of limitations does not apply, as is shown under page 67 herein, because this statute only applies to cases where the rights of the litigant during the period in which suit might have been brought were "exclusively of equity jurisdiction." *Butler v. Johnson*, 111 N. Y. 204.

Again we are forced to assert that the learned Circuit Court of Appeals was in error when it laid down the broad rule that Federal Courts in actions in equity *generally* follow State statutes of limitations from principles of analogy, for we venture to assert that this Court was right in its decision (*Pease v. Peck*, 18 How. [U. S.] 595, 599), where it pointed out that parties under the Constitution of the United States have a right to have their controversies decided by the Federal Courts on the unbiased judgment of the Court freed from the possibility of lack of impartiality by a State court; and this Court was also, we submit,

right when it said in *Gelpcke v. City of Dubuque*, 1 Wall. 175-206) that "we shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the sacrifice."

Surely, we submit, no Federal Court should feel bound in equity to follow the State statute of limitations, where to do so would be to subject inequality and unconscionable treatment upon a litigant.

(Tr. Rec. p. 151.) The learned Court was in error in discussing the point that a right of action arose in 1892 and 1893 when it said that there was no property of any kind in the hands of the City Treasurer out of which payment could be made "and no property out of which the redemption fund could be created." As a matter of fact there was a small fund in the hands of the City Treasurer because in some of the earlier sales when made for the full amount of the assessment, cash had been used; but a *redemption fund could still have been created*, if the City had properly performed through its City Treasurer its subsequent trust duties upon redemption. The error was in assuming the only trust duty that existed was to make the sales properly. As elsewhere pointed out herein (p. 28), it was the continuing trust duty of the City through its treasurer to insist on proper redemption; and proper redemption, we submit, was not made when the City, *after the sales*, for less than the assessments, allowed redemption in improvement certificates instead of cash and failed to cancel the certificate. If the City had insisted on redemption in cash there would have been a fund created or in any event the value of and demand for the certificates kept up. As the sales under the Act were to be made for cash, this Act necessarily contemplated that redemption if made *after a sale*, was to be in cash, as no purchaser using cash could be com-

elled to take certificates when redemption was made. But even if there had not been a duty to insist on redemption by the former owner in cash, still the failure of the City of its trust duty, through its omission to cancel certificates received in redemption for payment as required by the statute, but delivering them for further circulation, destroyed the certificate holders' rights just as much as the improper sale for less than the assessment had done. We endeavored to point out in our brief before the lower Courts that the holder of improvement certificates had two sources of compensation—one the fund which should have been created by a proper sale, the other the market value of certificates, to others who wanted them for redemption purposes or for use on the sale. Allowing the certificates to be reissued and thus used over and over again, which was exactly what was done, absolutely destroyed the demand for the certificates that existed after the sale. This was nearly as grievous a wrong to certificate holders as the wrongful sale itself. Therefore even after the sale a redemption fund could have been created by insisting on the former owner using cash in redemption, or the market value could have been kept up for the certificates to be used in redemption if the City had cancelled the certificates as it should have done instead of again putting them into circulation. (The Court of Appeals in *People, ex rel. Oakley v. Bleckwenn*, 126 N. Y. p. 310, pointed out the value to the owner based upon the demand for redemption purposes.)

(Tr. Rec. p. 151.) The Circuit Court of Appeals was likewise in error when it said that the Appellant's acquiescence was absolute from 1892 to 1905, with the exception of the suit he began in 1893.

The only period of possible acquiescence was from 1893 when the sales were completed to about 1901

when the Corporation Counsel and Appellant's former attorney started to draft the bill which when subsequently passed authorized the City to pay—a period of about 8 or 9 years, not 13. But in addition, said Court overlooked the effect of the injunction order of June 30th, 1893 (Tr. Rec. p. 114). This order restrained the City from receiving in redemption anything except legal tender money and restrained the City from marking as paid any assessment upon lands sold for less than the amount due. Here was a decision in the form of an injunction holding it unlawful for the City to allow redemption except where cash was used at the sale; and Appellant during the ensuing years had the right to assume that the injunction order would be lived up to. Thus it was clearly indicated that the Court felt that no right of redemption in certificates existed where the land had been sold for less than the amount of the assessment. This is not only a distinct disapproval by the Federal Court of any claim of right *to sell for less than the amount of the assessment*; it is also a decision that *the right to redemption in certificates did not exist where the sale was so made*. This was sufficient to preclude any plea of laches. This order, if lived up to, would have created a fund long after the improper sales. The learned Court said complainant "never did anything more with the 1893 suit than to begin it." But why should he? He had by the injunction order obtained the relief he sought. Why do anything more? This decision of Judge Benedict in June, 1893, was made *after the sales had been completed* and as consequently there could have been no object in joining the use of certificates at the sale, the effect of the order was to stamp as invalid sales for less than the amount of the assessments. The failure to live up to this

order in this respect and the subsequent cancellation of assessments of land sold for less than the amount, was a further breach of the trust inconsistent with the theory of *total repudiation* in 1892 or 1893, or that no redemption fund could have been created after 1892 or 1893 (Tr. Rec. p. 151). Each case on the question of laches should, we conceive, be governed by its own circumstances but where every fact in the case points to a total ignoring of a suitor's rights and the conduct of the defendant reeks with inequity and unconscionable doings, we submit that it is the duty of equity not to foreclose such suitor where inaction for a few years existed.

(Tr. Rec. p. 151.) Again we feel the honorable Circuit Court of Appeals was in error when it failed to give serious consideration to the negotiations of Appellant with the City saying that the same were "not upon a claim of right but of grace."

Having in mind that the proposed bill (resulting in Chapter 686 Laws of 1904) which was to rectify the wrongs done, was drawn by the Corporation Counsel of the defendant with the Appellant's then attorney, that the Act was passed and was "Accepted by the City," that the Appellant immediately filed his claim under the Act, that under such Act the City was given the right to pay off the certificates, that the petition for settlement is still pending unacted on, that in the interviews by said attorney with the assistant corporation counsel, he was told that no conclusion had been reached by the City, as to said petition, assuring him that he would take the matter up and render an opinion (Tr. Rec. p. 153), we say that surely such negotiations fall within the ruling of Vice Chancellor Vroom in *Scudder v. Trenton Delaware Falls*, 1 N. J. Eq. 694 (laches being interposed) where he said:

"it is not unlikely that there have been misapprehensions on both sides and that both parties have entertained the hope that the difference would be in some way adjusted and litigation prevented and in this way they have both been disappointed."

the Chancellor denying the plea.

How far apart the facts in the cases cited by the Circuit Court of Appeals (Tr. Rec. p. 151) on the point of laches are from the facts of the present case is apparent when it is noted that *O'Sullivan v. Felix*, 233 U. S. 318, was an action at law for damages for personal assault; in *Goddin v. Kimmell*, 99 U. S. 201, 210, the complainants slept upon their rights for 14 years and there was "not a single allegation in the bill nor a particle of proof introduced in their behalf to excuse their manifest laches in not seeking an account until all the parties in interest have departed this life"; in *Sullivan v. Portland*, 94 U. S. 806, 812, it appears from the opinion that

"the complainants were supine and silent for more than 17 years. In the meantime the Kennebec and Portland Company became hopelessly and finally wrecked. Proceedings were instituted to foreclose the second mortgage and brought to a close. The company lost all its property and has since existed only in name. A new corporation has come into existence and acquired and owns all the property and effects lost by the old one."

But in *Prevost v. Gratz*, 6 Wheat. 481, 496, this Court said:

"and the trust being once established, the burden of proof is shifted upon the other party to show its extinguishment: * * * it is certainly true, that length of time is no bar to a trust, clearly established."

B. CHAP. 686, LAWS 1904.

Before discussing the cases as to such laches as may preclude recovery under an express trust, special attention is invited to Chap. 686 of the Laws of New York of 1904. This Act was entitled:

"An Act to authorize the comptroller and corporation counsel of the city of New York on behalf of said city to compromise and settle with property owners interested, certain claims for taxes, assessments and sales for same, and for or on account of evidences of indebtedness issued on account of local improvements in the territory formerly included within the boundaries of Long Island City."

Furthermore the act was "*accepted by the City,*" Section one provides as follows:

"The comptroller of the city of New York acting under the written advice of the corporation counsel of said city is hereby authorized and empowered to compromise and settle certain claims for taxes, assessments for local improvements and sales for the same and certain claims arising from evidences of indebtedness issued on account of local improvements upon such terms as may be agreed upon with persons interested therein, and to purchase upon such terms as may be agreed upon, evidences of indebtedness issued to obtain money with which to construct local improvements, and the comptroller is authorized to issue special revenue bonds to provide the means necessary to make payments for the said purposes in the chapter. Corporate stock may also be issued manner provided by the Greater New York by the board of estimate and apportionment without the concurrence or approval of any other board or public body to make payments for the said purposes."

Section 2 provides as follows:

"This act relates only to taxes, assessments and sales for the same, and to evidences of indebtedness for local improvements within the territory formerly comprised within the boundaries of Long Island City, and to such taxes, assessments and sales for the same as were confirmed, levied or became a lien upon lands within the boundaries of Long Island City previous to January first, eighteen hundred and ninety-eight, and to such evidences of indebtedness as were issued previous to said date for or on account of local improvements within said boundaries."

Bearing in mind that this Act was the successor of those introduced during the three preceding sessions of the legislature drawn by the Corporation Counsel and complainant's then attorney, it is apparent that this Act had in mind complainant's certificates—and it in terms covers the certificates. It gave the City of New York through its Comptroller, upon advice of its Corporative Counsel power

"to settle claims for * * * assessments for local improvements and sales for the same and certain claims arising from evidences of indebtedness issued on account of local improvements * * * and to purchase * * * evidences of indebtedness issued to obtain money with which to construct local improvements,"

the Comptroller being authorized to issue special revenue bonds for corporate stock of the City.

And yet the Circuit Court of Appeals disposes of this Act without even a reference to it, but with the mere statement (Tr. Rec. p. 152) "after 1905 there were negotiations with the City not upon a claim of right, but of grace." If this Act was not a recognition by the Legislature, with the approval of the City which *accepted the act*, of the fact that the certificate

holder had a "claim" against the City; and if it was not a recognition of an obligation in some form by the certificate holder against the City, we fail to see any reason for the Act being passed. It would be a waste of discussion to gainsay this statement. If this Act were not intended to put the certificate holder in the position of receiving payment from the City which was given the express power to purchase certificates or pay the claim arising therefrom, then why the enactment of the same? If the certificate holder did not have the right to expect under this Act that his "claim" would be taken care of, then the Act was mere waste paper. If the City did not recognize some obligation on its part to the certificate holder, why should it have *accepted the Act*; why should its own Corporation Counsel have assisted in drafting the Act? We claim that not only did this Act and the petition filed thereunder absolutely destroy any claim of laches or staleness of the claim, but that *it was an absolute recognition by the City of an obligation of some kind to the certificate holder*, upon which the Circuit Court of Appeals was indisputably not warranted in brushing aside as a mere claim of "grace."

As to the District Court, it did not even refer to this Act, but entirely ignored it (Tr. Rec. p. 128).

C. THE OPINION OF THE DISTRICT COURT.

The cases cited by Judge Hand in his opinion below on the ground of laches are far from being convincing and we submit are in reality not in point. For instance, in *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, 138, the Court refused in an equity case to follow the Code provisions of New York, saying:

"In view of these authorities, it is clear that the Statute of New York upon the subject of limitation does not affect the power and duty of the Court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, * * *. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rule and principles applicable alike in every State," adding that the general rules that courts of equity "sometimes" act upon an analogy to the limitation at law, "must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective States in which they sit."

Again in *Clarke v. Boorman's Executors*, 18 Wall. 493 (cited as *Clarke v. Johnston*), the Court decided that plaintiff's ancestor had such knowledge of his rights in question and of the transactions of the trustees in settling an estate years before, as precluded his heirs from setting up ignorance of the transactions; for to the ancestor had been explained the reason why two prospective purchasers declined to complete a purchase of lands on account of a defect of title, and upon compliance with demands of counsel for the purchasers executed releases—being fully informed by his counsel of his rights at that time. The rights of innocent purchasers, therefore, had accrued. The ancestor lived twelve years afterwards but asserted no claim and the Court properly held that his children could not, twenty years thereafter be heard to urge that their ancestor was in ignorance of his rights, for (p. 508) :

"During twenty-two years of that time his right and the right of his children to bring suit was without obstruction or hindrance. Within that time the party injured, the party who committed the wrong, and all others en-

gaged in the transaction died," and the Court intimated that the delay was intentional.

But it made the following pertinent statement:

"It may be conceded that so long as a trustee continues to exercise his powers as trustee in regard to property, that he can be called to an account in regard to that trust. But when he has parted with *all* control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose. Such is the case before us."

But New York City has not to this day "parted with all control" or "closed up his (its) relation to the trust," but it "exercises authority under the trust" through allowing redemption.

Again in *Philippi v. Philippe*, 115 U. S. 151, 158 it appears that for a period of twenty-three years the defendant had maintained an adverse possession of a partnership. For eighteen years of that time the plaintiff's father, the original owner of the claim, had lived in the same city with the defendant, but had made no claim nor started action. Consequently, the Court was doubtless right in holding that the defendant's claim of title to the alleged trust property was freed of any claim the decedent might have had. Doubly so, as decedent had never during all this time made any demand from the defendant for a settlement of the trust, but had borrowed money from him and afterwards had repaid it.

Again in *Speidel v. Henrici*, 120 U. S. 377, it appears that the delay in starting suit was for fifty years without any excuse therefor being shown, the Court

holding that the facts of that case brought it within the general rule, which was (p. 396):

"Length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*," citing cases.

The only other case cited by Judge Hand was *Pierson v. Smith*, 149 U. S. 231, which is, we respectfully submit, utterly apart from any question involved.

The learned District Court fell into the same error in assuming a "repudiation" that the Court of Appeals did, which we have fully, and we believe, satisfactorily answered elsewhere.

In view of the fact that the District Court and the Circuit Court of Appeals decided this case adversely to complainant on one ground only, that is laches or the statute of limitations (upholding our contention as to the existence of a trust and the consequent duties entailed upon Long Island City, the trustee, and being favorably impressed with our contention of the unconstitutionality of the Acts of 1879 and 1886), we are taking up a discussion of the various points of law decided, out of their natural order and addressing ourselves in the first instance to the point upon which said Courts rendered their adverse decisions.

In our briefs before both Courts we advanced the point, not perhaps stressing the same as fully as we do here, that the Act of 1874 was analogous to a trust agreement with Long Island City as the trustee and the holders of certificates of indebtedness as beneficiaries. We did point out, however, that *there were other subsequent trust duties upon the City than the one merely of seeing that the sales were properly made*. We submit with all deference to the learned

Courts referred to that they were totally in error in assuming, as they did, that there was only one trust duty to be performed, which was the making of the sales; which assumption, if correct, naturally led to the further assumption that if the failure to perform such one trust duty was equivalent to a *repudiation* of the trust, the statute of limitations or laches began to run from the day of the sale. That both Courts took this erroneous position (of only one trust duty to be performed) is apparent, for Judge Hand said (Tr. Rec. p. 129), mistakenly assuming that the trustee's only duty was in foreclosing the lien of the assessments and properly distributing the money realized, it supposed such act "was the final execution" of the trust obligation, and "when the City sold all the lots and accepted the certificates in payment, it undertook, and as it supposed it successfully undertook to wind up the whole proceeding and if some of the certificates remained unpaid, that was supposed to be one of the misfortunes inherent in the situation." The Circuit Court of Appeals entirely overlooked our contention of other trust duties and did not even refer to them (Tr. Rec. pp. 142, *et seq.*). While we do not concede for a moment that the improper sale was equivalent to a *repudiation*, but maintain, as we have always done, that it was merely a breach, yet it is not difficult to see, if it be conceded that the improper sale was a *repudiation* and not a *breach*, and there was *no further trust duty to be performed and that the statute of limitations or laches began to run in 1893, the time of the improper sale* that the enactment of Chap. 686, Laws of 1904, and the subsequent proceedings thereunder totally nullified any possible claim of laches under the statute (pp. 62 *et seq.* this brief).

Later on we will cite authorities to the effect that

the improper sale was not a *repudiation*, and that where no *repudiation* of a trust exists neither the statute nor laches begin to run. It is important, therefore, *in limine*, to satisfy this Court that there were other trust duties contemplated by the Act to be performed, *after the sale*, from which it will naturally follow that, if they were performed or the trustee purported to perform them, the trust relationship continued to exist and there could have been no repudiation thereof in 1893. *So long as a trustee purports to perform a trust duty he recognizes the existence of the trust and such Act is inconsistent with a prior repudiation.*

If there are several trust duties to be performed, it is not possible to say that a *breach* of the earlier one in date is a *repudiation of the trust relationship*. If, for example, one trust duty is to be performed in one year, another the following year, another the following year, and so on, the failure or refusal to perform the first one does not result in a *repudiation* of the trust if the trustee performs or attempts to perform any subsequent one. Especially can there be no repudiation where the first was a continuing one (*Ford v. Clendenin*, 203 N. Y. 10, 18).

And yet this is the exact situation before this Court. There were various trust duties to be performed by Long Island City, as trustee, for the benefit of the certificate holders. One was to see that the sales were properly made; another was to see that no assessments were marked cancelled until paid in full and another was to see that redemption after sale was properly made, *i. e.* by payment in cash. It was quite as important from the standpoint of the certificate holder to see that redemption was properly performed as it was to see that the sale was properly made. The Act of 1879 (Sec. 10 makes

it perfectly clear that certificates of indebtedness used by the purchaser upon the assessment sale (if he bought with such certificates, not with cash) should have been immediately cancelled by the City. The Act of 1879 (Sec. 9) makes it equally clear that certificates used in redemption by the former owner of the land sold should have been cancelled. Both of these provisions were to protect the certificate holder. Both were trust duties. If the certificates used by the purchaser at the sale were to be cancelled and if the certificates used by the former owner in redemption were to be cancelled, it is apparent that it was the intention of the Legislature that the owner of the certificate of sale should receive cash upon redemption and that the certificates of indebtedness used upon redemption should not again be put in circulation. If again put in circulation, it can be readily seen that they could be used time and time again to cancel other assessments, naturally reducing the value of outstanding certificates. Therefore, the proper performance by the City of its trust duties in regard to redemption was just as important so as to keep the lien intact and protect the holder of certificates as it was to see that the sales were properly made and redemption in certificates of a sale for less than par of assessment, a grievous wrong (opinion Cullen, J., at pp. 142 *et seq.* this brief). Therefore, to recur: The City did have trust duties to perform long after the so-called repudiation of the trust by the improper sale in 1893. And the record shows that it has been allowing redemption even subsequent to the beginning of this action—that is it has been acting as trustee under one of these various trust duties subsequent to the beginning of this action (Tr. Rec. p. 78).

Therefore, how can it be said that the improper sale of 1893 was a *repudiation*? It was a mere *breach* of one of many trust duties. The reasoning of the learned Courts below was clearly in error, for the continuance of this additional trust duty completely destroyed the basis of their argument of *repudiation*, as repudiation implies a complete failure of recognition of further trust duties (*City of New Orleans v. Fisher*, 91 Fed. 574).

D. WAS THE CLAIM OF LACHES AT ISSUE UNDER THE PLEADINGS?

The allegations in the complaint (Tr. Rec. p. 24, para. 25, complaint) stating the reasons why complainant refrained from instituting suit were as follows:

"Your orator further avers that he had refrained up to this time from instituting suit for the reason that he believed that said acts of the Legislature would be approved by the Mayor, or that he would be able to obtain relief without litigation through the divers petitions that he and others have had presented to the municipal authorities for relief, and that it is only within the last few months that he has been forced to the belief, through the inaction of said City and its said officers and agents that his only way to obtain relief was by application to this Court."

Thus this statement we submit explains sufficiently, in view of the bills introduced into the Legislature and negotiations had, the reason for complainant's delay, *but no issue was raised on these allegations*. To be sure, defendant (Tr. Rec. p. 29) attempted to answer it as follows:

"This defendant does not know and cannot set forth as to its belief or otherwise as to the

statements contained in the paragraphs * * * '25.' "

This statement by defendant in its answer was not sufficient to constitute a denial and did not raise an issue. Such statement was totally inadequate under the rules of pleading in force when the answer was served. The answer was served before November 4th, 1912 (same verified April 12th, 1911, Tr. Rec. p. 33). Therefore the effect of the answer was governed by the Equity Rules in force before November 4th, 1912, when the present rules were promulgated to take effect. To be sure the new rules in effect November 4th, 1912, provide (Rule 30) that a statement by defendant that he had no knowledge of the truth of certain allegations in the complaint were by the force of Rule 30 to be deemed a denial. Prior to the adoption of Rule 30, the old Equity Rules promulgated to take effect March 2nd, 1842, were in effect (Dewhurst's Rules of Practice in U. S. Supreme Court, 1907 edition). Under the equity practice in force before November 4th, 1912, a mere statement of lack of knowledge was no denial and raised no issue; and the additional statement made by the defendant that it "cannot set forth as to its belief or otherwise" as to the statements contained in paragraph 25 made the answer no better. In *Bradford v. Geiss*, F. C. 1768, it was held that where the denial that defendant denied he had any knowledge of the facts charged, but but it was not added that he had no information, the answer was insufficient. In *Quackenbush v. Van Riper*, 1 N. J. Eq. 476, it was held that a statement by defendant in his answer that he did not know as to the matters charged or that he did not believe them, was insufficient. In *Kinneman v. Henry*, 2 Halstead 90, it was held insufficient for defendant to say that he had no knowledge of a fact charged in the bill.

In *Morton v. Warner*, 3 Edw. Ch. 106, it was held that a denial of knowledge, but not of information, was not sufficient for the reason that from "information," belief may be shown; the bill called on the defendants to answer according to the best of their knowledge, information and belief; and one of the defendants had answered a part, by saying: "he did not know and therefore left the complainant to make such proof thereof as he should be advised and was able to do." The Vice Chancellor said:

"This is not enough. He may have information, although not personal knowledge; and upon such information, may have formed a belief; and when this is disclosed, it may save the complainant the necessity of taking proof of the facts as against this defendant. If the latter had said, he had neither knowledge nor information or that he was utterly and entirely ignorant, save and except from the bill itself, this would have been sufficient. He could not then be required to express his belief. When a defendant says, he does not know, he should, at least, add, if the fact be so, and has not been informed except by the bill; and then, his answer will be sufficient."

To same effect see *King v. Ray*, 11 Paige 235, 237:

"The rule requiring an answer according to knowledge, information, and belief demands that a defendant, in order to avoid, because of ignorance, an answer as to the truth of matters charged, should deny that he has any knowledge, information or belief concerning such matter, or that he has any knowledge or information sufficient to form a belief. It seems also that a denial of any knowledge or information is alone sufficient without requiring a statement as to belief; but any less comprehensive form is bad."

Such answer therefore raised no issue at all and while under old Equity Rule 61 it may be that if no exception were filed the *answer* itself was deemed sufficient so as to prevent a decree *pro confesso*, without some proof from complainant, still, there was no issue on, or denial of, the allegation thus insufficiently answered—an effect not to be overlooked by an Equity Court. While, therefore, it may still have been advisable for the present complainant, as a matter of form, to introduce *some evidence* in support of said allegations, it was at most only *necessary* to introduce some evidence and the same we submit has been fully performed by complainant; and the amount of such formal proof through the absence of a proper denial was reduced to a minimum—the unnecessary verification of the answer not rendering the answer itself evidence.

E. THE TRUST HEREIN CREATED ARISES BY VIRTUE OF THE INTERPRETATION OF THE LANGUAGE AND PROVISIONS OF THE ACT OF 1874. IT IS, THEREFORE, AN EXPRESS AS DISTINGUISHED FROM A CONSTRUCTIVE TRUST IMPOSED UPON PARTIES IN SITUATIONS COMMONLY KNOWN AS QUASI-CONTRACTUAL.

Opinion of Circuit Court of Appeals (Tr. Rec. p. 148).

New Orleans v. Warner, 175 U. S. 120.

In the Matter of Carpenter, 131 N. Y. 86; Amer. & Eng. Ency. of Law (2nd Ed.), Vol. 28, pp. 903, 904.

There has never been any accounting by the City as trustee nor has there ever been any severance of the relation as such of *cestui que trust* and trustee between the certificate holders and the City, the lat-

ter never having *repudiated* its trust relationship, though it may have denied that it was under a *legal* obligation directly to pay these certificates; but it has even down to just prior to the bringing of this suit at all times recognized an obligation regarding the fund (Tr. Rec. pp. 77, *et seq.*), and at all times in dealing with the lands assessed and their sales claimed to be performing its duty and justified its actions under the Acts of 1886 and 1874.

Complainant was not guilty of laches.

Nor has the complainant been, during the period since the creation of the trust, in any way guilty of laches—mere inactivity for a few years is not laches. While the Act of 1874 contemplated immediate action regarding the improvements and apparently its provisions were forthwith acted upon, no sales of lands for the improvement fund took place until 1888, after which time they were continued, particularly in 1892 and 1893. From about that time on, as appears from the testimony of Mr. Benner (pp. 51, *et seq.*), various negotiations were had more or less continually looking to some arrangement for the relief of certificate holders, including plaintiff's injunction of June, 1893 (Tr. Rec. p. 115); and particularly in 1904, an Act of the Legislature was passed, Chap. 686 (drafted a year or two before with the approval of the City of New York itself, p. 53, and the co-operation of Mr. Benner, complainant's then attorney), authorizing the City to compromise and settle claims based on these certificates and to purchase the same and to issue revenue bonds of the City therefor, or corporate stock; and this Act (as it appears therefrom) was "Accepted by the City." This was most assuredly at least a sufficient recognition of the liability of the City to remove any doubt that the City would make good its wrong, and to toll the statute or laches, if

any there had been. But no actual result having been obtained by virtue of the negotiations under and pursuant to such an Act, the complainant did finally (Feb. 21, 1905) file its claim for a compromise or settlement which is still pending and unacted on, though the Assistant Corporation Counsel upon Mr. Benner's request for action thereon stated that he (the Assistant Corporation Counsel, subsequently the Acting Corporation Counsel who verified defendant's answer herein) had not "come to any conclusion on it" but "didn't want to disturb a sleeping lion" (Tr. Rec. p. 53), but said "repeatedly that he would take up the matter and render an opinion." Finally, as the City continued its vacillating course, the plaintiff demanded an accounting from the present defendant, successor in interest of Long Island City, in 1910 (Exhibits D, E, F, G, H, I, Tr. Rec. pp. 97, *et seq.*), and shortly thereafter in that year, filed his bill herein for an accounting.

The fact is that during all the period since the sales of 1892 and 1893 (the ones complained of), Long Island City and afterwards the present defendant have been at all times disposed to take advantage of every circumstance permitting postponement of decisive and determinate action and their attitude has not been different in that respect since the bill was filed herein either toward taking testimony before the Referee or bringing the matter on for final determination by the Court. Thus the complaint was served about July 18, 1910 (p. 29), the answer not till about April 12, 1911. Plaintiff started to take testimony April 18, 1913, having deferred doing so time and time again at defendant's request, gave about six adjournments or similar requests in May or June, 1913, and deferred bringing the case on for trial at same request from July 2, 1914, to May , 1916, the day of trial. It will be noticed that the greater part

of the documentary evidence introduced by complainant came from records of the City itself. These records were necessarily accessible to defendant. Numerous adjournments were given and defendant's counsel had unusual courtesies and facilities extended to him, in order to enable him to introduce such witnesses as he desired or to cross-examine complainant's witnesses.

Under the most favorable viewpoint to defendant, it cannot charge plaintiff with sleeping on his rights longer than from June, 1893 (date of plaintiff's injunction, p. 114), to not later than 1901 or 1902, when negotiations were begun by plaintiff's then attorney with the Corporation Counsel of New York preparatory to introducing bill to the Legislature (afterwards enacted as Chapter 686 of 1904; Tr. Rec. p. 53)—that is, a period of inactivity of at most eight years—followed by continuous activity since then) demands, Exhibits, pp. 97, et seq.).

Consequently in 1888 and up to 1892, when the first sales for less than the amount of the assessment were made, the certificate holders had no practical grievance. Hence, there was, up to that time, no necessity for action on the certificate holders' part. There was, therefore, no practical occasion for complaint by the certificate holders or for action on their part, until 1892, when the sales for less than the amount began, for there still remained a market for their securities, which the Court of Appeals in the *Oakley* case recognized at page 314:

“They would instead induce purchase by property owners, and especially so if the price was less than par, for the lien of the assessment could be discharged through that medium of payment.”

In *Scudder v. Trenton Delaware Falls*, 1 N. J. Eq. 694, 670, Chancellor Vroom said, where the defense of laches was interposed:

"It is not unlikely that there has been misapprehensions on both sides and *that both parties have entertained the hope that the difference would be in some way adjusted and litigation prevented, and that in this way they have both been disappointed,*" and he denied such plea. (Italics ours.)

This Court should consider the situation in which the owner of improvement certificates found himself under all the existing circumstances. In the first place, an action was carried to the Court of Appeals of the State of New York in an attempt to vindicate the rights of such a person. True, it is now apparent that the action was based upon a wrong theory, if indeed there was any comprehensible theory back of it at all, but that was a situation which in any event only a skilled attorney could have appreciated at the time after a complete investigation. When a decision came down, which was unfavorable to the certificate owner who had caused the action to be brought, there was, of course, a very natural discouragement felt by other certificate owners, who could not then have known of the perfunctory manner in which the case had been presented (see discussion of this case, p. 147 this brief).

Then for a period of years the certificate owners naturally thought their remedy was obtainable through the Legislature or through the City whose agents had perpetrated the wrong. Repeated attempts were made to have remedial legislation passed, in fact Chapter 686, Laws of 1904, was actually enacted through co-operation of the City's attorneys authorizing the proper City officials to make restitution.

When this had been accomplished (prior bills having been introduced) one can see considerable time was employed in endeavoring to convince the City that it should make the restitution authorized by the act. Finally this proved unavailing as the City has through unwarranted procrastination failed to act on the petitions.

During this time repeated efforts were made to induce the City through its proper officials to settle the whole matter in an equitable fashion, both independently of the statute above mentioned and with relation thereto. As a matter of fact, the evidence shows the City did not at any point definitely terminate these negotiations by a refusal, but kept the matter open and undecided (Test., Benner, p. 53), the Corporation Counsel having said "repeatedly that he would take the matter up." From month to month one could not know, but that the next week might see the whole matter on a fair way to adjustment, and, of course, a suit or proceeding brought during the progress of such negotiations might have had a detrimental effect upon them.

About 1901, as heretofore pointed out, the first proposed Act resulting in Chapter 686 of the Laws of 1904, was drafted and introduced (Tr. Rec. p. 53). This was done by the Assistant Corporation Counsel (later Acting Corporation Counsel, Tr. Rec. p. 32) with complainant's then attorney. The Act was, of course, to effectuate payment of these certificates. The co-operation of defendant's attorney shows they recognized the injustice to the certificate holders. The proposed bill was to remedy this injustice. Surely, complainant had a right to assume that the injustice would be rectified if the bill were passed and the defendant's attorney knew such was his attitude. The bill was passed in 1904 and the

City Comptroller and the Corporation Counsel were given authority to pay off the certificates—a clear recognition of an intention to rectify a wrong. But as the testimony shows (Tr. Rec. p. 53) from that time while the petition to adjust was on file with the City, the attitude of the Corporation Counsel was evasive and unsatisfactory, but still of such a nature as to warrant a hope and belief in Complainant that his petition for relief would be granted. The dilatoriness and lack of ingenuousness of the City does not entitle it to any great consideration in a court of equity, under its technical plea of laches or the statute.

The claim we make that the Act of 1904 was a recognition by the Legislature of a liability on the part of the City, is clearly borne out by *Lincoln County v. Luning*, 133 U. S. 529 and *Robertson v. Blaine County*, 90 Fed. 63, both of which were cited in *Rialto Irrigation District v. Stowell*, 246 Fed. 295, 306, 307.

In the *Lincoln County* case, bonds were issued under the funding Act of 1873. In 1877, the County became delinquent in its interest and the Legislature passed an amendatory Act providing for the registering of overdue coupons and imposing upon the Treasurer the duty of thereafter paying the coupons as money came into his possession. The coupons, which by the general Limitation Law would have been barred under the Act of 1873, were presented for payment and payment refused because the interest fund was exhausted. The Treasurer however, registered the coupons, but from that time on had no money in the Treasury applicable to the payment. The Supreme Court after pointing out the said facts, said as follows:

"This Act, providing for registration and payment in a particular order was a new provision for the payment of these bonds, which was accepted by the cred-

itor and created a new right, upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment and for payment through which he might safely wait. It amounted to a promise on the part of the County to pay such coupons as were registered, in the order of the registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been created."

In the *Robertson case* certain coupon bonds had been issued by Alturas County. Subsequently thereto this County was abolished by Act of the Legislature, the same being consolidated with Logan County, the new County being called Blaine County, the latter being made liable for the bonds previously issued by Alturas County. The action was against Blaine County on the Alturas bonds and would have been barred by the Statute of Limitations but for the liability imposed by the Act of the Legislature creating Blaine County. But the Federal Court said as follows:

"So far as Blaine County is concerned, the bonds are but the evidence of the valid and legal indebtedness of Alturas, which it agreed to pay. The debt was originally to be paid by Alturas County, Blaine County, except for the provisions of the statute referred to cannot be held answerable for the debt; but, by the Act, new obligations were created, and the matter of payment was changed."

So in the instant case by the Act of 1904 the obligation of Long Island City, which was assumed at the time of consolidation by New York City in 1901 under Chapter 466 of the Laws of 1901 (Tr. Rec. p. 21, para. 21, of complaint) became free from any

possible defense that might have been then interposed based upon the Statute of Limitations. And the action was brought in 1901, less than 10 years after the consolidation under the Act of 1901, and less than 10 years after the sales in 1893.

Where the rights, remedies and procedure are intricate and indefinite, where the interests of many persons are intermingled and conflicting, where the power of a great municipality is involved and where many proceedings of a legal and other nature are going forward, the situation is such that a delay extending over a period twice as long as here, would not, we submit, necessarily be laches at all, and it is this situation which the record discloses existed in this case.

In short, the lapse of time has been exceedingly detrimental and costly to the complainant but has been in no way prejudicial either to Long Island City or to the present defendant who for all this long period of years have been in the position of having certain of their public streets greatly improved and the tax valuation of the abutting property greatly enlarged and without having been obliged to perform their manifest obligation to provide the fund expressly directed for the reimbursement of the persons who advanced their own money for the public improvements and benefits that were made.

The rights of defendant have been in no wise jeopardized by the passage of time. The present case is not one of the complainant standing by and allowing things to transpire through which rights in favor of third persons have accrued or through which an estoppel would arise. He protested against the improper sales and nothing done by him since then is inconsistent with his attitude of protest. He did not co-operate in the wrong, but objected to it. The

liability of defendant to respond in this action is due to the highly improper acts of the agents of its predecessor—and to nobody else. New York City is not an innocent party, for it stands in the shoes of the actual transgressor. The complainant and other certificate holders at the time of the sales and at divers times since then expressed their disapproval of the act of the City Treasurer. Surely, they occupy the position of innocent parties more fully than does the City of New York, the successor trustee.

The defendant did not, and cannot, submit authorities that inaction by a *cestui* for a period of ten years, even in the case of a *total repudiation of all trust duties* by the trustee, is a bar to his claim against the Trustee.

Moreover, it is well established that the Statute of Limitations does not run against an express trust until the positive breaking of the *trust relationship* and the repudiation of the trust not only takes place but is brought home to the knowledge of the *cestui que trust* (cases cited, *infra*); and further, laches will not prevent a complainant from having the relief sought merely because of lapse of time, no matter how long, unless the complainant has for such a period slept upon his rights that under the facts of the particular case it has operated in some way to the prejudice of the defendant rather than to his continuing and increasing benefit as has been the situation in the case before the Court.

Such is the rule both in England and here.

The plaintiff was not in any respect guilty of laches. He did not sleep on his rights. Even if he had done so, as the trust is an express one, his rights were not interfered with—and any delay was tolled by the Act of 1904 and proceedings thereunder (*supra*).

In *Rochefoucauld v. Boustead*, 1 Ch. Div. (1897),

page 196, it appears that the defendant knew that the land held by the defendant was claimed by the plaintiff as having been conveyed to the defendant as Trustee for her and in the correspondence between them he never denied her title although he never expressly admitted it. The plaintiff took no proceedings for twelve years after the correspondence had ceased. It was held (p. 211,) that "lapse of time without more" was "no bar to a suit by a *cestui que trust* of an express trust." It was pointed out further that in the case of such a trust, "lapse of time coupled with other circumstances which render it unjust to give the plaintiff relief against the defendant will induce the Court to refuse the relief," although not barred by the Statute of Limitations; but "in this case which is one of express trust, there is nothing, except time, and that without more is not sufficient apart from some Statute of Limitations."

In *Hancock v. Welsh*, F. C. 6012 (3 Woods 351), where a bill was filed against the Commissioner of the General Land Office of Texas to restrain him from allowing locations of land within the limits of a grant made to a party under whom the plaintiff claims, which grant was afterwards confirmed by Texas; it appearing that later on the then Republic of Texas became a State of the Union and under the joint resolution of Congress she was allowed as one of the conditions of annexation to retain the vacant unappropriated lands for the payment of debts of the Republic: it was held that the State became a trustee bound by the trust assumed by the Republic of Texas which was not extinguished by its annexation to the Union and that neither lapse of time nor any defense of limitation could be set up as a defense to its liability to execute such express trust. The Court said that an express trust, "is defined to be a trust created

by instruments that point out directly and expressly the property, persons and purposes of the trust." And "as between trustee and *cestui que trust* in the case of a trust such as this the State of Limitations is no bar and no length of time is a bar."

F. LACHES OR THE STATUTE MAY BE TOLLED.

But furthermore, there is no doubt that laches may be tolled as well as a Statute of Limitations and it may be tolled by the time occupied in negotiating for settlement, as was done in the present case (Testimony of Benner, Benedict and Wanninger, *supra*), as well as to the extent of the time allowed to the defendant to perform his duty—that is to 1893, the time of the last sales. Thus "a party is not chargeable with any delay which may occur before his right to sue becomes complete * * *" or during a period allowed by law for defendant voluntarily to perform the duty"—16 Cyc. 167, and "delay will be excused when occasioned by efforts to obtain a settlement or satisfaction without litigation. * * *"—16 Cyc. 173, and also *Scudder v. Trenton Delaware Falls*, *supra*; *Hodge v. Palms*, 117 Fed. 396, 399, and *Kline v. Cutter*; 34 N. J. Eq. 329, 331. The statement to the contrary of the Circuit Court of Appeals in the present case (Tr. Rec. p. 152) is clearly error.

In *Macey v. Macey*, 5 L. R. A. (N. S.), the period of negotiation was recognized and the Court held the complaint therefor not barred by laches.

In *Compo v. Jackson*, 49 Mich. 39, more than thirty-five years had elapsed since the making of the agreement which was the basis of the suit, but the Court held "lapse of time alone will not necessarily operate as a disseizin in law or in equity, and the bill

does not indicate any considerable delay since the company gave up negotiating and denied her rights."

In *Calender v. Calender*, 17 Conn. 1, the delay was in part caused by defendant's assurances and it appearing that no harm was done by the delay in suing it was held that the defendant was not precluded.

In *Seymour v. D. C. & B. R. Mills*, 56 Mich. 117, it was said (syllabus), "laches is hardly imputable where plaintiff's claim has been made consideration for adjustment most of the time before suit."

In *Springer v. Springer*, 114 Ill. 550, 553, it was held that laches as to property held in trust, could not be set up to cover any period during which defendant admitted the rights of complainant.

Negotiations were pending with a law officer of New York City based upon a petition filed after the passage of an Act, providing for payment of complainant's certificates, which Act, as well as its predecessor, was drawn with the co-operation of the said law officer. An examination of the record shows that Complainant's rights were never disputed after his petition was filed, but he was clearly led to believe that his claim would be given recognition (Tr. Rec. p. 53). This, therefore, is not the case of a mere general incidental assurance by a trustee of some indefinite recognition of the rights of a *cestui* nor is it the case of negotiations for settlement based upon hopes merely of the aggrieved party, without any encouragement by the other.

In *Lincoln v. Luning*, 133 U. S. 529, at page 533, it was said:

"When payment is provided for out of a particular fund to be created by the act of the debtor he cannot plead the Statute of Limitations until he shows that that fund has been provided."

This fund was never created as the Act of 1874 contemplated.

The above rule requires no elucidation by authorities and is especially applicable where the duty to create the fund is a trust duty.

See:

Lincoln County v. Luning, 133 U. S. 529;
Freehill v. Chamberlain, 65 Cal., 603;

both of which cases were cited in *Rialto Irrigation District v. Stowell*, 246 Fed., 295, 306, 307 (*supra*, p. 39). In the latter case, to which attention is especially invited, it appears that counsel for plaintiff claimed that the bonds, which had been issued by the Irrigation District under an express promise to pay, but which also contained a provision that they were payable out of revenue to be derived from an annual tax to be levied, were not the bonds of the City, but payable only out of "the particular fund," relying upon the rule that if only payable out of such a fund which had not been created, the Statute of Limitations would not have been applicable. In view of the express promise to pay, the Court properly held that these bonds were obligations of the Irrigation District, not payable merely out of such tax fund, but it clearly recognized the rule that if they had been payable solely out of a fund, to be created, the plaintiff's rights would not have been barred by the Statute of Limitations, because such fund had not been created and that such statute would not have begun to run until the fund was in existence.

The Circuit Court of Appeals in the present case admits (Tr. Rec. p. 150) that the trust fund which should have been created was not created, therefore its decision in holding that the Statute of Limitations barred complainant was wrong under the authorities.

As already said nothing in the act of 1886, nothing in the procedure under the act rendered the creation of a redemption fund impossible. It was of course plain that the procedure taken by the County Treasurer under that act might—perhaps would—tend to *reduce* the amounts to be paid at the sales, but none could predict that there would be no fund, and no court could legitimately hold that the creation of any fund would be made *impossible*.

The theory of the court below is that *no money whatever* could possibly be received upon sales, because certificates would always be used in payment, and the certificates issued equalled the assessments. This, however, is not true for the assessments bore interest at the rate of ten per cent while etc. Despite the fact that certificates could be used as cash it is quite possible to imagine cases where the competition at the sale, owing to increased value of the land, might induce bids from persons who had and could not readily acquire certificates or acquire them at all.

But let it be assumed that the legislation of 1886 made it absolutely impossible that any money whatever should flow into a trust, can it be that such legislation is to be regarded as a repudiation of the trusts? If so, all that a trustee needs to do in order to escape from the trust is to destroy the trust property, in some way annihilate its income-producing capacity or the possibility of its conversion into money. If he can do that he may in time be able to plead repudiation and laches.

The proposition for which we contend is that no act of a trustee done upon or as to the trust property can be a repudiation. *Repudiation means a denial of the existence of the relation of trustee to the beneficiary.* Nothing else can be.

Assume property worthless save for the gold ore within it to be the subject of a trust, would the ex-

traction of all the ore be a *repudiation*? Necessarily not for there might be other profitable ore in the land although unknown; the act of the trustee would be merely a breach.

The court could cite no relevant case in support of its remarkable doctrine that a trust is *repudiated*, if somehow the trust fund can be *annihilated*.

In short: The sales of land and assessment sales for less than the amount of the assessment reduce the fund for redemption of certificates and where cash was not used in payment it interfered with the creation of the fund. The allowance of redemption at ~~par~~ in certificates after the sale for cash prevented the creation of the fund contemplated in the original act.

But particularly bearing upon the facts in the case at bar, is the language of Mr. Justice Brown, in the case of *New Orleans v. Warner*, 175 U. S. 120, cited *supra*, and the facts in which it *will be remembered* are very analogous to the facts in this case, Mr. Justice Brown saying upon the question of express trust, State of Limitations and laches on page 130, as follows:

"The rule is well settled that in actions by *cestuis que trust* against an express trustee, the statute of limitations has no application, and no length of time is a bar. While that relation continues, and until a distinct repudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them. *Perry on Trusts*, Sec. 863. In *Oliver v. Piatt*, 3 How. 333, 411, it is said that 'the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known

to the *cestui que trust*.' To set the statute in motion the relation of parties must be hostile, and so long as their interests are common, or their relations fiduciary, as in the case of landlord and tenant, guardian and ward, vendor and vendee, tenants in common, or trustees and *cestuis que trust*, the statute does not begin to run. *Zeller's Lessee v. Eckert*, 4 How. 289; *Seymour v. Freer*, 8 Wall. 202; *Lewis v. Hawkins*, 23 Wall. 119. This doctrine has been applied in Louisiana, in favor of an administratrix having claims against the estate, in which it is held that, as she cannot sue the estate, the statute will not run against her on her claims against the estate, so long as she is administratrix. *Succession of Farmer*, 32 La. Ann. 1037; *McKnight v. Calhoun*, 36 La. Ann. 408. A like ruling was made with respect to taxes levied for a particular purpose, as to which the city was held to be a trustee, in *School Directors v. Shreveport*, 47 La. Ann. 1310.

"This trust has never been repudiated by the city. In fact one of the defenses set up in the answer was that the city had applied itself with great diligence, and to the full extent of its ability, to improve and make serviceable the drainage work and to proceed with the collection of draining taxes, and did all in its powers to prosecute the collection of the same, extending the drainage work on its regular tax bills, which were asserted and claimed in every account filed in the Courts by administrators, executors, syndics and other persons exercising like authority. By these modes and others, collections were made and accounted for. Indeed the whole gist of the answer is that the city has executed its trust faithfully, so far as it was possible to do so, by collecting assessments against private persons, but has not accounted for taxes assessed against itself, because it is not legally responsible therefor. There is no claim throughout the answer that the city disavowed the trust.

"At the time the assessment rolls were homologated and the judgments against the city were rendered, there was no claim made that the city was not responsible, or that the public grounds, streets and squares were not assessable for these improvements; and in so far as the collection of these judgments is concerned, the city stood in the same relation of trustee to the warrant holders which it did with respect to the assessments upon private property."

This case the learned Court below said was "not applicable" but did not point out why or how or in what respect. We respectfully submit that not only was it applicable, but that on this point of laches, it is controlling.

Jewell v. City of Superior, 135 Fed. 19, 22; *City of Galena v. Amy*, 5 Wall. 705, 708; *New Orleans v. Warner*, 175 U. S. 120, 131, 132 and other cases cited in Point 2 B prove that an actual and express trust was created by the Act of 1874. Such being so, under the law of New York State applicable thereto, the time does not begin to run against a *cestui* until there has been a total repudiation of *all* trust duties—not a mere breach or perhaps a repudiation of a mere part thereof.

In *Lammer v. Stoddard*, 103 N. Y. 672, 673, the Court said:

"It is undoubtedly generally true that as against a trustee of an actual, express, subsisting trust, the statute does not begin to run against the beneficiary until the trustee has openly, to the knowledge of the beneficiary, renounced, disclaimed or repudiated the trust."

This rule was cited with approval in *Talmadge v. Russell*, 74 A. D. 7, 14; *Roediger v. Kraft*, 169 A. D. 304, 306, and *Shallholz v. Sheldon*, 216 N. Y. 205, 209, where the Court said: •

"While an express trust subsists and has not been openly renounced, the statute of limitations does not run in favor of a trustee."

In *Potts v. Alexander*, 118 Fed. 885, 891, it was said:

"The bill does not disclose the existence of an express trust in which no length of the time could be a bar to an accounting and in which laches could not be imputed to the *cestui que trust* in the enforcement of his rights. *In re Jones*, 51 A. D. 420." * * *

In *Matter of Jones*, 51 A. D. 420, it was said *inter alia*:

"The rule is that as long as there is a subsisting and continuing trust acknowledged or acted upon by the parties, the statute does not apply." * * *

In the present case the proof was to a great extent documentary, based upon documents in the possession of the defendant, relating to the record of method of conducting the sale and allowing the redemption, which matters were also of record with defendant. No evidence was lost by the delay, no harm was done, and the plea of the statute or laches is an inequitable attempt to perpetrate inequity upon complainant, who has lost large sums of money, with no right to redress unless this Court grants equitable relief—and this in spite of the fact that the Lower Courts recognized a trust as subsisting.

The case of *Oliver v. Platt*, 3 How (U. S.) 321, in which the opinion was written by Mr. Justice Story, has become a landmark among the decisions on the question of laches. On page 410 he said as follows:

"Another objection is to the lapse of time. The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust

and time begins to run against a trustee only from the time when it is openly disavowed by the trustee who insists upon an adverse right and interest which is fully and unequivocally made known to the *cestui que trust* * * *. But the facts could not have been fully known or understood until within a few years before the filing of the bill and at most probably not exceeding eight or ten. *That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity.* There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly consonant of the trust it can furnish no ground for any denial of the relief which the case otherwise required."

And it was held (syllabus), the laches of no period less than 20 years would bar a *cestui* of his equity, although he might have been guilty of some negligence where the suit was brought against the trustee who was guilty of the breach of trust.

In the present case, under no possible construction could it even be claimed that the delay was *over 17 years*, that is from 1893 to 1910; but from 1901 or 1902 to 1910 there was no laches (pp. 34, *et seq.* herein).

It is too elementary to cite authority that a trust may embrace a number of duties thereunder and that a mere breach of one even though it may be the most important is not a breach of the trust relationship. If the trustee afterwards recognized any of the other trust duties, as Long Island City did and defendant is still doing through redemption (provided for by the statute and for the benefit and protection not only of the property owner but the certificate holder), then, there was not a *repudiation* of the trust. A recognition by the trustee of even a single duty under the trust is a recognition

of the relationship and the relationship being recognized, there is no *repudiation* of the trust and the statute has not begun to run.

In *Merritt v. Merritt*, 32 A. D. 442, 452, it was said:

"The appellant further contends that the Statute of Limitations is a bar to any recovery against the defendant. It does not appear that either John J. Merritt, as trustee of Joshua Weeks, or his successor in interest therein, has ever in any form repudiated his liability as a trustee to account to the *cestui que trust* under the will of Joshua Weeks. This was an express trust, and as between the trustee and the *cestui que trust* the Statute of Limitations has no application and no length of time is a bar. (2 Perry, Trusts, Sec. 863 and cases cited; *Lammer v. Stoddard*, 103 N. Y. 672; *Gilmore v. Ham*, 142 id. 1.)"

In *Lowrey v. Hawaii*, 215 U. S., 554, 577, the Court quoted with approval from *Oliver v. Piatt*, 3 How. (U. S.) 333, 411, saying that it was said in that case:

"That *the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust*; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trusts*." (Italics ours.)

And quoting from *Tyman v. Warren*, 53 N. J. Eq. 313, 321, as follows:

"I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof, or changed relations that it would

be unjust to now permit him to exercise his right."

And the Court in the *Lowrey* case held that the change in the performance of the trusts,

"Was not of itself an unequivocal disavowal of the trust, or an assertion of adverse right or interest in the government" (page 578).

We might add what the Supreme Court said in *Galliher v. Cadwell*, 145 U. S. 368, 373; referring to cited cases,

"They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." (Italics ours.)

In *Lemoine v. Dunklin County*, 38 Fed. 567, it appears that in 1857, persons under whom plaintiff claimed had purchased certain swamp lands under a law requiring the Governor to issue certificates. This duty was that year transferred to the County Court. In 1886 demand was made for a certificate and it was refused—no reason appearing for the delay. The Court held that a trust existed and decreed relief, saying:

"The law has been long and well settled that the trustee of an express trust cannot invoke the statute of limitations against the *cestui que trust*, until he has done some act in open violation or in disaffirmance of the trust," citing *Oliver v. Piatt*, 3 How. 411, *Seymour v. Freer*, 8 Wall. 202. *Lewis v. Hawkins*, 23 Wall. 126, to which case the attention of this Court is especially called; and distinguishing *Speidel v. Henrici*, *supra*, and *Godden v. Kimball*, 99 U. S. 201.

In *City of New Orleans v. Fisher*, 91 Fed. 574 (C. C. App., 5th Dist.), the Court said, page 584, "prescription does not, as a general proposition, run in favor of the trustee *as long as the trust relation continues*," citing *Oliver v. Piatt, supra*.

In *Re McKinley*, 15 Fed. 912, it was said:

"The underlying principle of these decisions is that mere lapse of time will not bar claims against the trust estate, * * * so long as the estate is unadministered and the trust subsist. The principle is perfectly sound, * * *."

In *Sayles v. Tibbitts*, 5 R. I. 179, held that a bill for accounting would lie of proceeds of sale of mortgaged premises filed 25 years after time of sale, saying:

"Against accountability under such a trust, it is well settled, that the statute of limitations does not run in a court of equity, as it does against accountability under a legal trust, or one enforceable also by action at law."

In *Riggs v. Polk*, 21 S. W. 1013, 30 years' delay was held no bar to correct a deed where the error had been admitted by the parties.

In *Britton v. Macauley*, 7 Grat. 478, a creditor asserted his interest in property conveyed in trust and interest was admitted. At the expiration of twenty years he filed his bill but allowed it to abate; twenty years later he filed another bill and it was held that he was not barred by laches or stateliness of claim.

In *Butler v. Hyland*, 89 Cal. 575, a delay of nineteen years, where no harm was done by it, was held not laches.

In *Re Mellish Estate*, 1 Pars, Eq. Cas (Pa.) 482, the Court held that when circumstances required it, it would not refuse aid on account of mere lapse of time.

The Court should not overlook the fact that a claim of staleness should not be allowed if first made on the oral argument (*Green v. Terwilliger*, 56 Fed. 384, 387).

Nor should it overlook, as elsewhere shown, that laches is not a mere question of time, unless coupled with injury in some form to the opposing party—it never being allowed as a plea where its results would be inequitable.

Thus in *Wilson v. Equitable Trust Co.*, 98 Ill. App. 81, 90, it was said the "doctrine of laches is not applied in equity where to do so would be inequitable" (reversed in another point in 200 Ill. 23). To the same effect see *Harris v. McIntyre*, 118 Ill. 275.

In *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 59, "laches is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting a claim to be enforced (*Gallagher v. Cadwell*, 145 U. S. 12 Sup. Ct. 873)" * * *.

G. REPUDIATION.

The statute never begins to run until a *distinct and unequivocal repudiation of the whole trust relationship*.

Reitz v. Reitz, 80 N. Y. 538.

Hutton v. Smith, 74 A. D. 284 (aff'd 175 N. Y. 375).

The trust existing at the time of the sale being a continuing trust as pointed out elsewhere in this brief "so long as the relation of trustee and *cestui que trust* continues to exist, no length of time will bar the *cestui que trust* in his rights in the subject of the trust" * * *."

Pomeroy Eq. Jurisp., Vol. 5, Sec. 28, citing many cases.

As pointed out in *Perry on Trusts*, Sec. 863:

"Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years."

In the foregoing show that where a trustee mixed his own money with that of his *cestui* and purchased property, taking title in his own name, it did not constitute a *repudiation*.

Similarly:

Davis v. Davis, 86 Hun 400, 402.

Barnes v. Courtwright, 37 Misc. 60, 62.

Zebley v. F. L & T. Co., 139 N. Y. 461.

The facts of this last case showed a delay by a bondholder of many years before starting suit. The action was started in 1888 for an accounting against a trustee under a railroad mortgage, plaintiff being holder of bonds. The bonds were issued in 1869, payable in 1889. The railroad company defaulted and the trustee foreclosed in 1875, buying in the property itself, conveying the property to a new corporation—the plaintiff never having received any benefits of the reorganization. It was held that the action was brought in time, the Court not following *Speidel v. Henrici*, 120 U. S. 377 (cited by Judge Hand in his opinion), in which case there was a delay of fifty years, as shown by circumstances, the Court saying, page 468:

"In this state, however, it has long been settled that such circumstances are only evidence upon an issue of fact with respect to the existence of the claim, the ownership of the party setting it up, or its subsequent payment, settlement or extinguishment in some way." Citing cases.

H. WHAT IS A REPUDIATION?

In *Daley v. People*, etc., 178 Mass. 13, 18, Holmes C. J., it was said that:

"A mere refusal to pay money when due, especially a refusal based upon the terms of a contract and in good faith, although *mistakenly* believed to be justified by it, is *not a repudiation* of the contract, and does not warrant a rescission." (Italics ours.)

In *Electric Welding Company v. Prince*, 195 Mass. 242, 256, it was held that a refusal by a stockholder to pay calls on his subscription was not a "repudiation," the Court saying: "a refusal to pay calls is no more a *repudiation* of the status of a shareholder than a refusal to pay what is due under a contract which can be rescinded is a rescission."

In *Cromwell v. Norton*, 193 Mass. 291, a man claimed that certain land deeded to his sister was under an agreement to reconvey under certain circumstances. The sister when sued claimed that the agreement was for her to sell part for her brother and keep the rest; that she sold the part and turned the money over to him. The Court held, "it would therefore have been wrong to instruct the jury as the defendant requested that if the agreement was as testified to by the plaintiff, the sale constituted a violation of it, and the right of action accrued then and was barred by the statute."

So in the present case, the failure of the trustee to perform properly *one* of its trust duties was no more a *repudiation* of the trust, than were the acts in the cited cases. A breach of one or more duties by a trustee is not a *repudiation* of the whole trust, especially where he thereafter performs thereunder. A *repudiation* of one trust duty is not a *repudiation* of the trust.

As *Wood on Statute of Limitations*, page 1018, said:

"The statute never runs against the enforcement of an express trust until by some declaration or act of the trustee an end is put to the relationship of trustee and cestui que trust."

And the *continuous* redemption allowed until long after this action was started shows that the relationship has never been severed.

See to same effect:

Greenleaf v. L. & L. Company, 146 N. C. 505.
Richman v. Cox, 63 W. Va. 74.

And, "a beneficiary of an express trust is not barred by limitations from compelling the trustee to account, unless there has been an unequivocal repudiation of the trust." *Wood on Statute of Limitations*, p. 1019; *Re McCleary's Will*, 147 Wis. 60.

Nothing short of a total repudiation of the whole trust relationship, and every duty thereunder, can constitute a repudiation.

There Was No Repudiation.

(1.) We believe that what has been said heretofore makes quite clear the fact that there was no *repudiation*, but looking at the matter from another angle, this point is made doubly clear. The Act of 1874, as conceded by the Circuit Court of Appeals (Tr. Rec. p. 148) established an express statutory trust. It provided for the creation through the levy of assessments, of a fund to be kept distinct and apart from all other funds and to be applied to the redemption of the certificates. As said Court indicated, there was a trustee, a definite subject for which the fund

was to be raised, and a definite object to which it was to be applied—the three essentials of a trust.

Nevertheless, the Court said that a subsequent *repudiation* of the trust was authorized by (and took place under) the Act of 1886. This act itself did not declare that the trust was *repudiated*. It was merely a statute governing all tax sales in Long Island City and provided (as our opponents claim) that lands might be sold at tax sales for less than the amount of the tax thereon. The Act of 1874, under which the certificates were issued, in Section 5, provided that the assessment sales were to be conducted as tax sales were conducted (referring clearly to the tax law then in force, which did not authorize sales for less than the tax). The intermediate Act of 1879, amendatory to the Act of 1874, purported to give the purchaser at a sale the right to use certificates in payment. No one of these statutes denied the trust; there still remained a trustee, a trust fund and a purpose.

Although all lands (if our opponents are correct) might be sold under the Act of 1886 at a figure less than the amount of the assessments, such sales might nevertheless have realized *more* and the excess would have been applicable to the payment of the certificates—and the Act of 1874, Section 11, as well as the Act of 1886, Section 6, contemplated in terms such excess. The duty of the trustee, the City, through its treasurer, was fixed by the Act of 1874 (modified according to our opponents by the Act of 1886); hence, nothing done by the City under the Act of 1886 could be deemed a *repudiation* of the trust, but merely an act intended to be in furtherance thereof. The sales were merely breaches of the trust. Only a statute which would have made the accumulation of a trust fund *impossible* in any event could constitute a repudiation. The Court said "The result of the course taken

was to make is impossible" to establish the fund (Tr. Rec. p. 150), but the statute of 1886 did not necessarily work such a result, and the opposite was actually contemplated (Section 6).

Non constat that, owing to appreciation in value, the land might have sold for much more than the assessments. A statute authorizing a sale for less did not necessarily prevent the accumulation of a trust fund even though it might in some circumstances tend to diminish it. A statute which might contemplate a diminution of a fund still recognized the trust and it cannot be said that such an act *repudiated* the trust altogether. In fact, if it applied at all (as our opponents contend it did), it was a direct recognition of the trust.

Here is the first vital mistake in the reasoning of the Circuit Court of Appeals conceding the creation of a trust under the original law, it has misconceived the effect of the Act of 1886 and treated that act, which recognized the trust, as though it were a *repudiation* or destruction of the trust. *Repudiation must be the necessary and inevitable conclusion from the language of the statute*, otherwise the statute when applied, would tend merely to *diminish* the trust fund. There being no *repudiation* of the trust, there was no laches, for the Court does not claim that laches applies where a trust continues to be recognized. This whole argument is that inasmuch as the trust was repudiated there was laches before suit was brought.

2. The Act of 1879 in permitting payment to be made by the tender of certificates of indebtedness and the procuring of the City Treasurer at the sale under the Act of 1886, recognized the validity of the certificates as against the City. If the various acts of the City Treasurer were valid it was because of the existence of a valid trust. A statute cannot be held to

repudiate a trust, yet at the same time to admit its existence. If the trust was destroyed by that statute, there was no obligation upon Long Island City to recognize the certificates, much less could they be forced upon it in payment for taxes or assessment liens, and redemption in certificates of sales for less is still being allowed by the City.

3. Assuming, however, that the foregoing argument is fallacious, the Act of 1904 recognized the trust and, since its passage, the defense of laches cannot be maintained. There are now four specific acts of the Legislature upon this subject—the Acts of 1874, 1879, 1886, and that of 1904. Consider the situation when this last act was passed. By the Charter of Greater New York, the new City became liable for the valid preceding obligations of Long Island City. Naturally the Legislature would be slow to impose additional obligations upon the new City if there were not some equity in the case. Yet it passed the law of 1904, and the City of New York "accepted" the same. It did not merely allow the law to go into effect, without its acceptance, and the Assistant Corporation Counsel helped to draft the bill.

Either the Act of 1904 was a recognition of the trust, or it was not. The Circuit Court of Appeals treated this statute as mere "negotiation with the City, not upon a claim of right, but of grace." Is this so? This statute authorized the Comptroller and Corporation Counsel of the City of New York to compromise and settle with property owners, interested, certain claims for taxes, assessments, and sales for same, and for or on account of evidences of indebtedness issued on account of local improvements in the territory formerly included within the boundaries of Long Island City and issue revenue bonds to make payments thereof. The mode of pro-

cedure for compromise, settlement and payment is provided in Section 2 of the law, which makes it clear that the statute related only to particular claims such as those in suit. A statute authorizing a city to compromise, settle and pay claims against it was surely a recognition of the trust under the previous legislation. Even if this legislation did not validate the claims or render the defense of laches or limitation inapplicable, its manifest purpose was to recognize the equity of the claim, otherwise its enactment was ridiculous. The new trustee recognizes the existence of a trust, hence, even if prior to that date there had been a *repudiation*, which we maintain there never was, the trust was now recognized as existing. It is inconceivable that the Legislature had passed, and the City "approved" a statute authorizing city officials to pay claims *which were legally nonexistent* and which should no more be paid out of the City's funds than claims against Philadelphia, or London, or Paris (see cases cited at pp. 39 *et seq.*).

But a broader view of the Act of 1904 may be taken—that it was based upon the history of the entire proceedings. The fact was that the recipients of certificates of indebtedness had advanced their moneys in good faith to Long Island City to pay the cost of certain improvements in the expectation that a fund would be established by means of special assessments upon the property benefited and that out of this fund the holders of the certificates of indebtedness should be paid; that there was an eminent equity in the original provisions of the law which forbade the sale of any assessed property at less than the amount of the assessment and which forbade marking the assessments "paid," until *paid in full*; that the Act of 1886 had worked a gross injustice to holders of the certificates which should be rectified and that the City of New York through its Comptroller and Corporation Counsel should redress the wrong, they being given power

to compromise, settle the claims of and pay certificate holders. Taking this view of the statute the trust was recognized as in force and any prior repudiation, if there was any, was cancelled, but there was no prior repudiation as we have heretofore argued.

(I) WHERE A TRUSTEE BY HIS CONDUCT IMPROPERLY PREVENTS THE ESTABLISHMENT OF THE TRUST FUND, IT MUST ACCOUNT TO THE CESTUI THEREFOR.

The fact that the trust fund under the act of 1874 was not created is immaterial, so far as complainant's right to recovery is concerned. The City cannot stultify itself by pleading that no fund exists. Equity will not allow it to take advantage of its own wrong

Drucklieb v. Harris, 84 Misc. 291, 297, per Cardozo, J.
O'Beirne v. Allegheny, etc., Co., 151 N. Y. 372, 386,

holding the Court will retain the bill to ascertain damages for failure to create the trust.

In *Valentine v. Richardt*, 126 N. Y. 272, 277, it was said :

"It is a familiar principle that a court of equity having obtained jurisdiction of the parties and the subject-matter of the action, will adapt its relief to the exigencies of the case. It may order a sum of money to be paid to the plaintiff and give him a personal judgment therefor when that form of relief becomes necessary in order to prevent a failure of justice and when it is for any reason impracticable to grant the specific relief demanded."

Citing cases.

And equity will adapt its relief to the exigencies of the case.

Valentine v. Richardt, *supra*, at p. 277.

(J) IT BEING THE DUTY OF LONG ISLAND CITY, THROUGH ITS CITY TREASURER, TO MAINTAIN THE INTEGRITY OF THE ASSESSMENT LIENS, IT BECAME ITS DUTY THROUGH ITS OFFICERS, IF NECESSARY, TO BID IN THE LAND AT THE ASSESSMENT SALES FOR THE BENEFIT OF THE CERTIFICATE HOLDERS.

The preceding points of our brief have made clear, we believe, that the intention of the Act of 1874 was that the certificates should be *paid in full*, and that no assessments should be cancelled, until likewise paid in full; that the protection of the certificate holders required that the tax law in force in 1874 (Chapter 416, Laws of 1871) provided that lands should be sold as tax sales were then in 1874 being conducted; that there was a trust obligation on the part of the City, through its City Treasurer to see that the lien was kept intact and that the sales were properly conducted; that Long Island City was a trustee under the Act of 1874 for the benefit of the certificate holders. Under Chapter 461, Laws of 1871, Title 6, Section 26 (Charter of Long Island City) was the requirement as to the conduct of tax sales:

"If at any such sale no bid shall be made for any parcel of land, the same shall be struck off to the City for the term of one hundred years, and thereupon the City shall receive, in its corporate name, one of the certificates of the sale thereof, and shall be vested with the same rights as any other purchaser."

The said Act in section 23 provides that the tax sales "shall be made for the shortest period for which any person will take the premises *and* pay the taxes, assessments, interest, percentage and expenses."

Thus the trust duty imposed on the City to sell for not less than the full amount of the taxes, it being given the power to purchase the land where no bid was made therefor; in view of the trust relationship between the City and certificate holders, made it incumbent on the City at any assessment sale under the Act of 1874 not to sell the land for less than the amount of the assessment, but either to withdraw the land from sale, or if the full amount of the assessment could not be obtained, to bid the same in for the benefit of the certificate holders, in order to make good the fund contemplated by the statute out of which the certificates were to be paid.

(K) NEITHER THE 10-YEAR NOR THE 6-YEAR STATUTE APPLIES, AS THE TRUST IS A CONTINUING ONE.

On page 28, *supra*, we pointed out how the trust duties were continuing in their nature. There was not merely the one trust duty to be performed at the sale in 1893, as the Court of Appeals and the District Court assumed. It was just as important to the certificate holders to see that the redemption was properly made as that the sale was properly conducted. Even the breach by the improper sale was not entirely irreparable for a proper redemption would have protected their other security, to wit, the market value for certificates. The Court of Appeals in *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. p. 310, pointed out that certificate holders, *e. g.*, the contractor (complainant's assignor) took the certificates, in view of the *certain demand* that would exist among purchasers desiring them for redemption or desired for use upon the sale—in view of the parity existing between the amount of assessments and the certificates.

The further trust duty was to allow redemption *only as the law provided*, i. e., in cash, we submit, but in any event, if certificates were used, upon cancellation of the certificates. The failure to cancel and the reissuance thereof resulted in certain certificates being used frequently to cancel assessments, destroying the parity in amount and the demand therefor.

Thus the trust duty was a *continuing* one, arising each time a redemption was allowed—and redemptions were allowed constantly. (The record shows pages 77 *et seq.*, that redemption was made in 1899, 1907, and as late as 1913, after this action was started, by the use of certificates.)

The Court of Appeals decided in *Ford v. Clendenning*, 215 N. Y. 10, 16, that neither the 6-year nor the 10-year Statute of Limitations applies to a *continuing trust*, saying "The plaintiff's right of action, which concededly is one in equity to remove a cloud on title, is barred by the statutes quoted unless the right of action, instead of being one which accrued on September 29, 1883, is a continuous one accruing from day to day against which the Statute of Limitations does not apply or which perhaps more accurately stated is by reason of its continual repetition one against which the Statute of Limitations does not run."

This point of a continuing trust duty although referred to in our brief before the lower courts was either overlooked or ignored by the Courts. We submit that it shows quite conclusively their error in assuming that either the 6-year or 10-year provision applied.

(L) THE TEN YEAR STATUTE OF LIMITATIONS OF NEW YORK APPLIES ONLY TO CASES EXCLUSIVELY WITHIN THE JURISDICTION OF EQUITY AND DOES NOT AP-

PLY TO THE SITUATION BEFORE THIS COURT.

The defendant attempted to plead the ten-year Statute of Limitations of the State of New York (p. 208), which is set forth in Section 388 of the Code of Civil Procedure. This section however only applies to cases "exclusively within equity jurisdiction," and not to cases where an action could have been brought at law.

Butler v. Johnson, 111 N. Y. 204.

Zweigle v. Hohman, 75 Hun 377, 380.

As this action was started about seventeen years after the wrongful sales of 1893 were made, the twenty-year statute of the State of New York, Section 379 of the Code of Civil Procedure could not possibly apply. While we believe we have conclusively demonstrated that under no circumstances is the plaintiff barred by any provision of the Statute of Limitations or laches, for the period of inactivity was at most from 1893 to 1901, still it is evident that even if the ten years statute would otherwise bar the plaintiff it has no possible bearing, because the jurisdiction of law and equity was concurrent (during this 17-year period), to afford the plaintiff some relief—(of course, such relief was not practicable as it could not have been as full and complete as in equity). Such is the case from the fact that before the improper sales of 1892 and 1893 were completed (but after such sales had been started) a mandamus could have been sued out by the plaintiff to have stopped the further unlawful sales threatened, and to have compelled a proper sale. It is elementary that only when the relief at law is as full as that in equity, the limitations applicable to an action at law apply where the action is brought in equity.

Therefore while plaintiff had the right in the present case to sue in equity because the relief such court could afford was broader and fuller, yet as a court of law could have taken jurisdiction by mandamus or otherwise during the period in which redemption from improper sales was being made, law and equity were *concurrent and the ten-year statute had no application.*

We might add that it is extremely seldom that a court of equity will hear a plea of laches short of the statutory period, and *never where gross inequity follows.*

In any event the period of inactivity was only 8 years from 1893 to 1901.

(M) THE SIX YEAR STATUTE OF LIMITATIONS OF NEW YORK DOES NOT APPLY TO THIS ACTION.

We have shown heretofore that the ten year statute does not apply to the pending case, and also that the twenty year statute has no application, because the action was started seventeen years after any action could have been begun.

The defendant pleaded the six year statute of limitations upon the theory probably that section 2 thereof (section 382 of the Code of Civil Procedure) relating to liabilities created by a statute was applicable.

This action in equity does not seek to enforce *any* statutory right, nor is it brought *under any statute.* The action is one in equity to enforce a trust and for an accounting, based upon the wrongful acts of the defendant and its predecessor, which acts were in violation of the vested contract rights of the plaintiff protected and guaranteed by the Federal Constitution (complaint and page 130 the decree in the District Court).

This action does not seek to compel the defendant to sell the property, (it would be too late to do so, as the property is all sold), or to levy the assessment as called for by the Act, as the assessments had been levied. It is merely to enforce the rights of the plaintiff, on account of the acts of the defendant and its predecessor which deprived the plaintiff of the property right (constitutionally guaranteed to it) in the maintenance of the integrity of the lien created to secure payment of these certificates.

Conclusive on this point we believe is *Clark v. Water Commissioners of Amsterdam*, 148 N. Y. 1. In this case a statute had provided for the appointment of water commissioners for the purpose of supplying Amsterdam with water. They were given the power to condemn land and the method of procedure was specified in the Act. The land of the plaintiff was taken in 1882, but it was not until slightly less than ten years thereafter that the plaintiff commenced a proceeding to obtain relief. It was claimed that the six year statute applied and that the claim was barred. The Court of Appeals overruled the General Term on this point and said at page 7:

"We think the General Term erred in holding that the Statute of Limitations constituted any bar to this proceeding. It is objected to a recovery that the proceeding is one to recover upon a liability created by statute, and that it is also one to recover damages for an injury to property."

It was then pointed out that it was claimed that subdivisions 2 and 3 of section 282 of the Code of Civil Procedure applied. The Court denied this saying:

"We are of the opinion that this proceeding comes under neither subdivision of the section above quoted. It is in no sense a proceeding to recover upon a liability created by

statute. The liability in this case is a liability to make compensation to the owner of lands and property taken by the water commissioners under the provisions of the statutes above quoted. *The liability to pay for property taken is not created by either statute. It is a constitutional liability instead of a mere statutory one.* *The Constitution prohibits the taking of private property for public use, without due compensation being made therefor.* The legislature in giving to the City of Amsterdam or its agents in its behalf the right to take property for public use, and in providing the proper proceeding to be followed in the taking of such property was creating no statutory liability whatever. It was simply delegating the power to take the land and providing the procedure by which the land might be taken and the constitutional liability to make due compensation might be carried out and enforced. Such a liability, we think, does not come within the second subdivision of section 382. *The statute did not itself create the liability, although the compensation was to be collected by means of the procedure provided for it.*

"Nor is it a proceeding to recover damages for an injury to property, as provided for in subdivision 3 of this section. It is not a proceeding to recover damages for anything. The water commissioners have not injured the plaintiff's property and he seeks to recover no damages for any injury to it within the meaning of the limitation statute. What he seeks is compensation in the shape of payment for the value of the property appropriated and taken by the City of Amsterdam, through its authorized officials and the resulting depreciation in value of the remaining property. It all comes under the head of liability to make compensation for property taken."

We believe that the above is conclusively in point for the relief complainant seeks is the enforcement

through equity of his constitutional right, based on the claim that the integrity of the lien of the assessment, the security for his certificates, has been unconstitutionally and unlawfully taken from him.

(N) LONG ISLAND CITY WAS GUILTY OF A GROSS BREACH OF ITS TRUST DUTIES, THROUGH THE FAILURE OF ITS OFFICIALS TO CANCEL THE ASSESSMENT CERTIFICATES USED UPON REDEMPTION AND IN PAYMENT AT A SALE, AND IN ALLOWING REDEMPTION IN CERTIFICATES AT PAR AFTER SALES, MUCH MORE SO, WHERE SALES HAD BEEN MADE FOR LESS THAN ASSESSMENT.

The gross carelessness, inefficiency and breach of trust of Long Island City through the failure of its officials becomes apparent when the provisions of section 7 of Chapter 326 of the Laws of 1874 under which the certificates were issued are borne in mind. This section provides that,

"All certificates received by him in payment of such assessments or accrued interest thereon * * * shall be forthwith effectually and permanently cancelled and defaced * * *."

(Similar provisions in Chap. 501, Laws 1879 as to certificates used in payment at a sale.)

Thus in the statute itself is the direct command of the legislature that *all* certificates used in payment should be cancelled. The object was to prohibit their being put in circulation again. Such certificates if again put on the market would naturally reduce the value of the outstanding certificates by increasing the supply according to the natural laws of supply and demand. We find, however, that the City Treasurer instead of cancelling the certificates used upon redemption immediately turned them over to the purchasers at the assessment sales (Tr. Rec., p. 42). The purchaser, therefore, immediately looked for a market and sold

the certificates to some third person desiring the same to acquire lands at a sale. This new holder came in and bid in lands for, say, a quarter of the assessed value, received certificate of sale and had his improvement certificates canceled and the assessment marked off. The owner of the right of redemption came in and redeemed the land from the owner by delivering to him an equivalent amount of certificates which he had acquired for a nominal amount. In short the assessments were cancelled, no funds collected by the City Treasurer, and the only source of payment the contractors holding certificates had was to sell them to some one else for what he could get, on an average of 10c to 50c on the dollar. That is the contractor got 10% to 50% of his contract price *and no more* if he sold his certificates and *nothing at all* if he stood upon his rights and looked to the fund which was never created, and the City received the benefit of tens of thousands of dollars of work for a fraction of the contract price.

Especially heinous was the offense, in view of the sales for less than the assessment. A certificate holder had never contemplated a redemption in certificates after sale, for if so why the provisions of the Act of 1879 requiring cancellation of the certificates used in purchase? The purchaser, upon redemption, was therefore necessarily intended to receive cash, which negatived a redemption after a sale in anything but cash.

(1) *The Act of 1874 contemplated a cash trust fund.*

The Circuit Court of Appeals (Tr. Rec., p. 150) held in looking at the situation from 1893 after the sales were completed that the creation of a trust fund, out of which the certificates could be paid, was *impossible*. The Court was palpably in error in making this

statement and this error laid the foundation for the application of the doctrine of laches and led to the erroneous decision of the Court as to the complainant's rights. A cash trust fund was actually contemplated by the Act of 1874 and *was actually possible of creation after 1893*. Nowhere in the Act of 1874 was authority given to the City Treasurer to receive certificates from the former owner of the land in *redemption* after a sale. Section 11 gave the former owner the right to use certificates, "*in payment* of any assessments," but said nothing of a right to use them in *redemption*.

Payment of a tax is made *before* a sale. *After* that the owner has a right to *redeem*, not to *pay*.

"But when land has been sold for delinquent taxes, the owner's right to discharge the tax by *redemption* is lost and he has instead a right of *redemption* which must be obtained by means of the appropriate procedure" (37 Cyc. 1158, citing cases).

The Act of 1879 said nothing about the right to use certificates in *redemption* after a sale. The Act of 1886 being a general tax Act necessarily made no such reference. We concede that up to the time of a sale the former owner had a right to use certificates in *payment*, but his right as to use them expired upon the sale, because upon such sale the lien of the City on the assessments was transferred to the purchaser of the land at the sale and *redemption* from that time on was an act not concerning the City's own rights, but merely a purchase by the former land owner from the purchaser at the sale of the lien the latter had acquired from the City. It was a *redemption*, not a *payment*; and on right was given to make such *redemption* in certificates. The redemption provided for in the Act of 1886 (assuming that it applies)

was a redemption in *cash*. Indisputably, therefore, looking at the matter as the Circuit Court of Appeals did from the year 1893, after the sales were all completed, the creation of a cash fund for the redemption of the certificates was contemplated by the Act of 1874, and actually should have been created. Therefore there was a duty upon the City to see that such trust fund was created and such fund would have been created if redemption had been insisted on in cash instead of certificates. The Court of Appeals of New York in *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. 310, 316, pointed out that at the sale the lien of the City was transferred to the purchaser, saying:

"The purchaser at a tax sale has only acquired the lien of the municipality. He is the assignee, in effect, of the assessment lien, and is thus protected as to his payment, until his inchoate rights are consummated by the execution of his deed or lease. As to the owner of the land, it is a step taken to enforce the collection of the assessment and a proceeding which would result in divesting him of his ownership, unless he avails himself of the privilege of redemption."

The Act of 1874 provided for the issue of certificates of indebtedness equal in amount to the face of the assessments. The only inequality that could thereafter arise lay in the fact that the assessments bore ten per cent interest; the certificates of indebtedness seven per cent. The certificates could be used at par and accrued interest to pay any assessments with accrued interest thereon. They were payable with interest out of any moneys coming into the treasurer's hand to the credit of the improvement fund. When received in payment of assessments or by purchase as provided in the act, they were to be *cancelled* at par and accrued interest. The only

change made by the Act of 1879 was in permitting certificates to be used at par in payment at a sale of the land for non-payment of assessments or interest, but those so used were at once to be cancelled.

No injury was wrought to the certificate holder merely by this last Act.

Injustice to the certificate holder was however effected by the Act of 1886, in that it permitted sales for nonpayment of assessments *at less than* the amount of the assessments and also permitted redemption by the land owner from the sale upon payment of less than the assessment; in other words payment of the amount (with interest) at which the lands were sold. As Judge Cullen said (pp. 142 *et seq.*, this brief), if the City Treasurer sold the fee for less than the assessment, he was obliged to receive payment in money; to allow payment in certificates was to impair the value of the security remaining in the unsold land for the benefit of other certificate holders. It does not, however, follow as the Circuit Court of Appeals assumes that the result of the Act of 1886 is in any and every circumstance to prevent any fund whatever from coming into the hands of the commissioners or City Treasurer; only when it is impossible that there shall be a fund, can the law be held to constitute a repudiation of the trust. Even if no moneys whatever would come into the hands of the County Treasurer from sales for the assessments or in cancellation of the assessment, it does not follow that no moneys whatever would come into his hands in case of *redemption* by the land owner. His land might be extremely valuable but he might be incapable of purchasing certificates. It would not follow that he would sacrifice valuable land. He would, therefore, pay cash upon redemption. In this last case money would come into the hands of the Treasurer for the benefit of the improvement fund. This shows

that the statute does not necessarily work a repudiation of the trust.

POINT 2.

By Chapter 326, Laws of New York of 1874, providing for the grading and improvement of certain streets in Long Island City, which improvements were to be paid for in improvement certificates, in turn to be paid and redeemed out of a fund to be assessed and collected by officers of the City upon the property benefited—an express trust was imposed upon Long Island City to collect and administer the fund and to see that the various trust duties imposed by said Act were duly performed.

It will be noted that the District Court was impressed with the contention we made that a trust was created and attending trust duties thrown upon Long Island City by the Act of 1874 (Tr. Rec., p. 129), and the Circuit Court of Appeals followed very closely the reasoning contained in our brief before it (Tr. Rec., p. 148), where referring to the Act of 1874, it said:

"The right of the certificate holders was, therefore, a right to have the fund properly collected and administered. The making of the assessments, the collection of the assess-

ments and the maintenance and disbursement of the fund were duties specifically imposed upon the commissioners, assessors and treasurer of Long Island City. *We are not disposed to question that this created a statutory trust for the benefit of the certificate holders.*"

In our brief before the Appellate Court, as well as in our brief before the District Court we took the position that the Act of 1874 was analogous to a trust agreement under which Long Island City was the trustee, and the holders of certificates of indebtedness the beneficiaries. Under this Act various trust duties were imposed upon the trustee, all in one form or other for the protection of the holders of certificates of indebtedness, "so that no part of the property benefited by the improvements shall be exempted from paying its fair share of the expenses thereof" (Sec. 5) in order that the integrity of the lien for the protection of the said certificate holders should be kept intact and said certificates paid in full. See this point discussed fully, pp. 96 *et seq., infra.*

Nature of Action.

At the outset, that the Court may see exactly what the complainant's contentions are, as well as what they *are not*, we state as follows:

1. Complainant does *not* claim that any primary obligation *to pay the certificates* existed on the part of Long Island City; and this action is not brought to enforce any such liability. He does not claim that the certificates were in the nature of promissory notes for the payment of money—Long Island City being the promisor.

He does claim, however:

1. That the City Treasurer and Receiver of Taxes of Long Island City was a local officer and agent of Long Island City in and about the performance of the acts directed by the Laws of 1874 to be performed by him and in and about the conduct of the assessment sales made by him in 1888, 1892 and 1893, under Chapter 656 of the Laws of 1886, the reasons for this claim being that:

(a) It appears from Chapter 326, Laws of 1874 (under which the certificates were issued), that the acts directed to be performed by the City Treasurer and Receiver of Taxes and the duties imposed upon him, were local acts to be done for the benefit of Long Island City and its residents, and to be done by him as an officer and agent of said City, and further, that these acts were, therefore, *not governmental* in their nature.

(b) That in conducting the assessment sales provided for in Chapter 326, Laws of 1874, that is, under Chapter 656, Laws of 1886 (the tax law relating to Long Island City, in force when the assessment sales were had), the City Treasurer and Collector of Taxes was acting solely as a local officer and agent of Long Island City.

2. Complainant does claim that the Commissioners appointed under Chapter 326 of the Laws of 1874 were agents and representatives of Long Island City, although to substantiate his right to relief it is not necessary to do so, as he does not predicate his right of action on any neglect or misconduct, or any prejudicial act, of said Commissioners.

3. That Long Island City was derelict in not taking active steps through its Common Council or City Treasurer and Receiver of Taxes or other officers to

see that the lands sold at the assessment sales were sold for not less than the amount of the assessments with accrued interest; that it was negligent in not either purchasing the lands itself (as the charter of 1871 authorized it to do), for the benefit of the certificate holders, where no bids equal to the amount of the assessments and accrued interest were had, or in not withdrawing them in such event from sale, and thereby keeping intact the lien of the assessments. But of more importance still:

4. That the City, through its Treasurer and Receiver of Taxes, *breached, but did not repudiate the trust*, and acted unlawfully and *ultra vires* in receiving, upon the sales for unpaid assessments, improvement certificates at their face value in place of valid legal tender (especially in the face of protest), for the reason:

(a) That as to Chap. 501, Laws of 1879, which amended Chap. 326, Laws of 1874, if it authorized the officer conducting the assessment sales to receive from purchasers improvement certificates in payment at their face value, it was violative of the Federal Constitution as regards the rights of certificate holders and their assignees (including complainant), who had taken such certificates for value prior to the passage of said Act, in reliance upon the provisions of Chap. 326, Laws of 1874, which *did not authorize* such certificates to be used in payment by the purchasers at assessment sales.

5. That there was a *continuing express trust duty* on the part of Long Island City, through its officer, its Treasurer and Receiver of Taxes, to establish, create and maintain a fund necessary for the retirement of improvement certificates (the only security

which the certificate holders had); and to such trust duty, being *continuing* in its nature, the statute of limitations or laches does not apply, or if it applies, the eight years of inactivity of complainant were not sufficient to deprive him of his rights.

6. That even if the statute of limitations or laches would otherwise have applied, they have been tolled or waived through the City of New York's adopting and recognizing the acts of the City Treasurer and Receiver of Taxes and allowing redemption even after the beginning of this action, by the former land owners and receiving improvement certificates in payment and redelivering the same; through the numerous efforts of complainant to collect and compromise; and through Chap. 686, Laws of 1904, authorizing said settlement, "Accepted by the City."

7. Complainant finally claims that *the permitting of redemption in certificates at par, on sales for less than the amount of the assessment, was in violation of complainant's rights under the Federal Constitution;* and that these acts which took place presently and even after the commencement of this suit (Tr. Rec., p. 76), was a recognition of a trust duty, and the performance of a trust act of as paramount importance as that of making the sales properly, from which flows naturally the result that the improper sales of 1892 and 1893, could not possibly have been, as the lower Courts decided, a *repudiation*, but were merely a *breach*, of one important trust duty.

As the proper construction of the Act of 1874, is believed to be one of the principal questions presented for determination in this suit, a detailed analysis is submitted:

The Act of 1874.

By said Act, Chap. 326, Laws of 1874, entitled, "An Act to provide for Improvements in and Adjoining the first ward of Long Island City," it was provided:

In Section 1, the Street Commissioners of the City are continued for a period of five years and all streets to be graded, paved, etc., are specified.

In Section 2, after title to said streets is acquired by the City the Commissioners are directed to grade and improve them.

In Section 3, the Commissioners are directed to estimate and certify the cost of grading, etc., to the "Board of Assessors of Long Island City" and "The estimated cost of such grading," etc., "shall be assessed as nearly as may be upon the several lots in front of which the same shall be done."

In Section 4, the assessors are directed to make up an assessment roll, deposit a copy with the Commissioners and hear objections and make necessary corrections and to file the roll corrected in the office of the Treasurer and Receiver of Taxes of Long Island City, and *therafter such assessment is to be a lien upon the property assessed with interest at 10% until fully paid.*

In Section 5, no warrant for the collection of assessments shall be issued

"but all lots, pieces or parcels of land on which any assessments under this act shall remain unpaid on and after the day of the expiration of ten years after the filing of the assessment roll, affecting the section or subdistrict in which the lot is located, shall be advertised

and sold for the payment of such unpaid assessment; and such sale or sales shall be made by the receiver of taxes or other officer then charged by law with the duty of selling lands in said city for *non-payment of city taxes* and the proceedings for such sale, and such *sale shall be the same and on the same notice and like terms*; and said lots or parcels of land so sold may be redeemed, and in default of such redemption title thereto shall be given and perfected in the same manner, to the same extent and with the same force and effect; and the costs, fees, charges and expenses of such sale shall be the same as shall then be prescribed by law for the sale of lands in said city for non-payment of city taxes, without further action or legislation on the part of the common council or any other body.

"And the acts and certificates of the said commissioners as affecting any assessments may be amended if irregularities be discovered therein, and the amended acts and certificates shall have the same force and effect as their original acts and certificates. And it is declared to be the intention of this act that the fullest power of amendment shall be vested in said commissioners and said assessors, so as to promote substantial justice in the matter of said assessments and in enforcing their lien and collection, *so that no part of the property benefited by the improvements shall be exempted from paying its fair share of the expenses thereof*, but that the whole of the said expenses shall be borne equitably by all."

(Italics ours.)

In Section 6, any assessment may be paid at any time and improvement certificates later provided for may be received at par and

"All moneys received by said treasurer in payment of such assessments or interest shall be placed to the credit of the improvement

fund, consisting of the amounts in the hands of the treasurer growing out of payments of said assessments, and interest, *and shall be kept separate and apart from any other moneys in his hands, and no part of said fund shall ever be paid out by him, except for the purchase of such improvement certificates as provided in the seventh section of this act, or as is herein otherwise provided.* Suitable books of account shall be kept by said treasurer showing the date and amount of every payment made to him on each lot, for or on account of the sum assessed or of the accrued interest thereon, and *whenever the assessment on any lot shall have been paid in full with interest* said treasurer shall enter on the assessment roll opposite to and on the same line with the entry of the assessment so paid the words 'paid in full,' with the date of such final payment, and from and after such entry such lot shall be free and discharged of and from the lien of such assessment." (Italics ours.)

In Section 7, the City Treasurer at any time having \$5,000 to the credit of the Improvement Fund is authorized to advertise for and purchase and cancel certificates; and it is provided that "all certificates received by him (City Treasurer) in payment of such assessments, or accrued interest thereon, or which shall be purchased and surrendered pursuant to the provisions of this section, shall be forthwith effectually and permanently cancelled and defaced. * * *

In Section 8, it is provided that all grading, etc., shall be done under contract by lowest bidders upon terms made by the Commissioners;

In Section 9, it is provided that the work should be paid for by the issue to the contractors of Improvement Certificates signed by the Commissioners and by the Treasurer of Long Island City (those

now in suit are a part thereof), and in all contracts the Commissioners are to reserve the right to pay the contractors in Improvement Certificates;

In Section 10, the Commissioner are given power to receive title to any streets in behalf of Long Island City and to have the same power over streets as the Common Council of Long Island City and power to take legal proceedings to open streets, etc.

In Section 11, it is provided that all certificates shall be paid off after ten years and any excess of the Improvement Fund shall be paid into the City treasury;

In Section 12, the Commissioners are to act as a board, keep minutes and report to the Mayor of Long Island City, who may increase their number and fill vacancies and their remuneration for services under the act is to be paid out of the Improvement Fund;

In Section 13, the Treasurer is made liable on his official bond to the City for moneys coming into his hands and the City may enforce the liability for whom it may interest; and in the remaining Sections 14, 15, 16, 17 and 18 are various provisions that do not specially bear on the questions here raised.

Form of Improvement Certificate

The improvement certificates were issued in the following form: (Tr. Rec. p. 28.)

\$20.00

Improvement Certificate

No. 2326

State of New York

LONG ISLAND CITY

January 6th, 1879.

This is to certify that Farwell, Sage & Co. or bearer
is entitled to

TWENTY DOLLARS

with interest thereon at the rate of 7 per cent per annum, from the date hereof, payable out of the Improvement Fund in Long Island City, established under Chapter 326 of the Laws of New York, passed May 5th, 1874, entitled "An Act to provide for improvements in and adjoining the First Ward of Long Island City," this certificate being issued under the provisions of said act, and the said amount and interest being payable as provided therein.

P. G. VAN ALST,

WM. BRIDGE

H. S. ANABLE. Commissioners.

Countersigned,

John R. Morris,

\$20.	Treasurer of Long Island City	\$20.
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(Copy of back.)

This certificate is one of the Improvement Certificates in Long Island City issued under the provisions

of the act within mentioned. It draws interest at the rate of 7 per cent per annum and is receivable at par and accrued interest at any time in payment of any assessment laid under said act and of the accrued interest on such assessment.

The Acts of 1874 and 1879.

Chapter 326, Laws of New York of 1874, was intended to provide for the improvement of the First Ward, Long Island City, through grading, filling, paving, sidewalking, etc. It provided that the contractors who did the work *must take* their pay in improvement certificates (Sec. 9). In fact any contractor who did work was paid in certificates (Test., *Kearny, Tr. Rec.* p. 69). This Act expressly provided that the lien of the assessments *should not be cancelled* or marked paid until the certificates issued for work done were paid *in full* (Sec. 6); they could not be sold by the Commissioners for less than par (Sec. 9); and it was provided that it should be the duty of the City Treasurer to see that the lien of the various assessments *should not be marked satisfied until the* certificates were paid in full (Sec. 6). In short, the improvement certificates were to be protected by the lien of the assessments on the different parcels of land being kept intact until the certificates were paid in full.

There was also a provision in the Act (Sec. 5) that sales for non-payment of taxes should be conducted as they were conducted in Long Island City. There was no provision, however, in the Act of 1874 that at the assessment sales anything could be received from the purchaser in payment of assessments other than legal tender; nor was there any provision

Statute that purchasers at sales could use improvement certificates as a medium of payment. *But more important still:* there was no provision in the statute dispensing with the then requirements of law or abrogating the custom that as tax and assessment sales were then conducted, lands could not be sold for *less* than the amount of the assessment with accrued interest, much less that if so sold, redemption could be made at par, in certificates. This we submit is very important; for if the sales had been properly conducted a parity would have been maintained between the assessments and outstanding certificates, and necessarily the market value of the latter would have remained at or near par.

It was the well nigh invariable custom (as the evidence shows), and the law as well (Chap. 460, Laws 1871, Title 6, Sec. 23) up to the time the assessment sales of First Ward lands were had in 1888, 1892, and 1893, that lands at *tax sales could not be and practically never were sold for less* than the amount of the tax with accrued interest, etc. And Long Island City *invariably* bid in such lands at tax sales upon which a bid sufficient to pay the taxes with interest, had not been made, thus protecting itself as to taxes due itself (Exhibits P, R, N, W, Z, BB, EE, GG, at pp. 106 *et seq.*).

This Act of 1874 was amended by Chapter 501, Laws of 1879 (after the certificates in suit were all issued) which after (Sec. 1) providing for the issuance by the Commissioners of certificates of exemption of certain streets, recited that

"No such certificate of exemption shall in any way or to any extent affect or impair the lien or validity of any assessment made under said act, upon any lot, piece, or parcel of land in any such certificate mentioned, nor shall it

affect or impair any right or remedy for the enforcement or collection thereof, *unless payment in full of the residue of such assessment, with interest, shall be made prior to the final maturity of such assessment, as in said act provided, * * **" (italics ours).

It also provided in Section 10 that:

"At the sale of any lot, piece or parcel of land for non-payment of assessments or interest thereon, as provided for by Section five of said act, it shall be the duty of the officer making such sale to receive the improvement certificates authorized by the act aforesaid at par and accrued interest, in payment of the assessments and accrued interest for which such sales shall be made, * * * and such certificates when received by him shall be permanently and effectually cancelled and defaced by, and deposited with, the same officer."

The Act of 1886

In 1886 an act was passed governing tax sales in Long Island City known as Chap. 656. This Act in Section 3 provided that the City Treasurer and Receiver of Taxes of Long Island City should publish a notice that he would sell for non-payment of taxes, lands at public auction, first, "for the lowest term of years for which any purchaser will take the same *and pay the aggregate amount due thereon*," or, second, if no person should offer to purchase them for a term of years, then "in fee simple to the highest bidder * * * *to pay the taxes or assessments, water rates and rents, interest, percentages and expenses thereon which remain unpaid at the time of such sale*."

The following section provided that at the sale the property should be sold

"for the lowest term of years for which any purchaser will take the same *and pay* the aggregate amount due thereon, and if no person shall so offer to purchase such property for a term of years, said Treasurer or his representative shall sell such parcel, at fee simple, to the highest bidder. * * * Said Treasurer shall bid in in the name of the city for the use of the proper fund or account of all parcels of real estate at such sale, to be sold for unpaid taxes, assessments, water rates and rents, which shall not be sold to any other person."

In regard to this statute, appellant takes the position that if it purported to give the City Treasurer the right to sell any lands *for less than the amount of taxes or assessments and interest, etc.*, then it was unconstitutional and void in any application it had to assessment sales of lands under Chap. 326, Laws of 1874; for the reason that it, under such construction, took away the right that certificate holders had to look to a fund for payment of their certificates; that is it became discretionary thereunder with the City Treasurer and Receiver of Taxes whether such fund be established or not. The reference in the Act of 1874 (Sec. 5) that "such sale shall be the same and on the same notice and like terms" necessarily prohibiting a sale under any subsequent law in a manner substantially depriving a holder of his rights. Any contrary construction absolutely destroys all security. This point will be discussed later on (pp. 130 *et seq.*).

Complainant submits, however, that it was not the intention of this statute to give to the City Treasurer the right to sell lands at assessment sales for *less* than the amount of the assessment with interest and that the City Treasurer and Collector of Taxes in conducting the sales of First Ward lands thereunder acted wrongfully, improperly and without authority, as a result of which *no fund was created out of which*

the certificates could be paid, and the value of the certificates depreciated to a merely nominal amount; much less was the intention to permit redemption in depreciated certificates at par upon sales so made. The accuracy of this construction is apparent from the wording of the act which is that if the lands assessed could not be sold for a term of years sufficient to "pay the aggregate amount due thereon" (Section 3) and under which a sale was to be made for the lowest term of years "for which any purchaser will take the same and pay the aggregate amount due thereon"; and the duty of the Treasurer, to "*bid in in the name of the City and for the use of the proper fund or account*" *all* parcels not sold.

Extended comment is necessary in order to show how the conduct of the City Treasurer and Receiver of Taxes in receiving improvement certificates instead of legal tender at the sales in payment of the assessments, *and, more important still*, in selling the lands for nonpayment of assessments *for less than the amount of the assessments* with accrued interest, and of equal importance many years after *by allowing improper redemption, completely nullified* the rights of certificate holders and prevented the creation of a fund out of which the certificates were to be paid, *as well as completely destroyed the market for the certificates, to which market the certificate holders had a right to look for payment.*

The City prevented the creation by two acts, (a) by the improper sales of 1892-1893; (b) by allowing redemption during the ensuing years.

As the law stood at the time the certificates were issued, that is, before the amendment of 1879, a certificate holder—as for example, a contractor, who performed work, or delivered supplies, of necessity, took the certificates in payment for work done, *confident*

that there would be a fund for the payment thereof as well as a market for them, as contemplated by the Legislature; for—as the law then stood:

(1st) Lands could *not* legally be, and were practically never, sold at tax sales *for less than the amount of the tax with accrued interest* and the *assessment sales* under the Act of 1874 were to be conducted as tax sales were then conducted (Exhibits N, P, R, S, U, W, X, Z, BB, CC, EE, GG, QQ, pp. 107 *et seq.*).

(2nd) Land owners were given the right, by the Act of 1874 to *use the certificates in payment of assessments on land, but were given no right to redeem after sale in certificates;* but this act did not contemplate a sale for less than the amount of the assessment, or for a sale not paid for in cash; and to purchasers at *assessment sales*, the Act of 1879 *purported* to give the right to use them in payment of purchases made instead of cash, such certificate to be cancelled when used. (The certificates in suit were issued before the Act of 1879 was passed.)

That is to say, such contractor took his certificates believing that no assessments would be marked "paid" until paid in full, that such sales would be made as then provided by law, to wit, for the full amount of the assessment, that sales would be paid for in cash, not certificates, and that certificates issued in redemption would be cancelled if received in payment, and relied on the statutory assurance that there would be a market for his certificates (a) *among land owners* desiring to pay assessments in certificates, and (b) among prospective purchasers at sales. But the lands were sold for a fraction of the assessment, certificates were received in payment and not cancelled, certificates were received in redemption and not cancelled, but reissued. The amount of the assessments

and the amount of the certificates being *equal*, a parity (except as to interest), had, therefore, been created by the Act and was intended to be kept intact between the two; so that the assessment certificates would maintain approximately their par value. What right did the City Treasurer have to receive certificates at par in redemption after a sale for cash? We say none. By failing to establish the fund, the market was destroyed, for no one desired certificates with no means of payment, and no one needed \$100 in certificates to cancel \$100 of assessment liens when \$25 or less in certificates would accomplish the same result.

Such was the condition of affairs created when Chap. 501, Laws of 1879 was passed, which purported, as above said, to give a purchaser at a public sale the right to buy First Ward lands at sales for non-payment of assessments *and to use certificates instead of cash in payment, said certificates, to be cancelled when so used.* The statute was unconstitutional, as it prevented the creation of a *cash fund out of which the contractor had the right to have his certificates paid.* (The certificates in suit were issued before this Act.)

But the first of the two great breaches of the trust duties came in March, 1892, when the City Treasurer and Receiver of Taxes claimed, over the protest and objection of numerous persons, that he had a right to sell, under Chap. 526, Laws of 1886, First Ward lands at assessment sales for the highest bid, *regardless of what such bid might be.* Acting under this interpretation of the law, he, over protest then made, sold most of the First Ward lands in question, for a great deal less than the amount of the assessments with interest, and received certificates of improvement in payment thereof, and cancelled the lien of the assessment (at the 1888 sale he had sold for the full amount

of assessment). Complainant submits that under the custom of conducting tax sales, and under the law existing theretofore, as well as by the Act of 1886, the City Treasurer and Collector of Taxes had no right to sell First Ward lands at assessment sales for less than the amount of the assessments with accrued interest thereon, much less to do so and take certificates in payment.

Of course, we are not generally interested in the matter of the constitutionality of the Act of 1886 or in the things that might be done thereunder. We contend that as a matter of legislation, the act itself as interpreted by the City Treasurer could not be constitutional as to rights accruing before its passage. But if the City Treasurer insisted in acting in the manner complained of herein, it was at least Long Island City's duty through him, to bid in such lands for the protection of the certificate holder as it had been its custom to do at tax sales since 1871; and the City was guilty of a breach of trust in allowing the sale to be so conducted, as well as in not bidding in for the benefit of the certificate holders the lands for which no bid for the full amount was otherwise received, or withdrawing the same from sale, as he could well have done.

As a result, a purchaser at an assessment sale would bid in, for example, parcels of land, assessed at \$1,000.00 with interest amounting to \$50 for an amount in most cases of from one-half to one-twentieth of the amount due on the lien at the time of sale, say one-tenth, or \$100. He was allowed to use certificates at par in payment and would get the land subject to the owner's right of redemption. The owner was then wrongfully allowed to redeem his land on paying the amount for which it had been sold, and use the depreciated certificates to redeem—although the law

required cash to be paid in all cases of redemption after sale. His land would now be free of the lien of the assessment although it would possess the full benefit of the improvements, and the certificates used in redemption after sale were uncancelled. The transaction would be closed leaving by far the greater amount of the lien actually unpaid, though in fact cancelled on the records. This prevented the creation of any fund and nullified the lien of the assessments—the security provided by the Act of 1874, for the protection of the certificate holder. Certificate holders seeing that no fund was being created out of which certificates could be paid, and seeing that the lands were being sold for much less than the amount of the assessment were helpless and were deprived of any market for their certificates. Nobody wanted certificates with a depreciated security. *Hence the bottom fell out of the market for the certificates.* By the time all of the liens had been marked paid under this system of conducting the sale, over \$300,000 (par) of certificates were still outstanding with no lien for their protection, with no fund created, and the certificates unlawfully used with which to redeem uncancelled.

Without going into greater detail on this point, we say that it is difficult to imagine a grosser case of wrongdoing than that which exists in the present case. The contractors did the work; the complainant advanced moneys which went into the work; the City received the benefit of the work through increase of the value and consequent increased taxation; the land owners in the First Ward were benefited through increased values; the owners of land subject to the payment of assessments paid off their assessments and got their lands cancelled for an approximately trifling figure; the purchasers at tax sales acquired

lands for much less than the assessed value which if not redeemed belonged to them absolutely. The only person who lost was the man who did the work—the contractor, his assignee and the man who advanced the money. *The result was nothing more or less than a deliberate steal.* The contractor or his financial backer parted with his time, labor and supplies or money, and received next to nothing—that is, received only what he could get for his certificates, which in most cases was less than one-half of their par value and in many cases less than a twentieth of their par value, and in the present case *nothing*.

The culmination of the wrong came, however, years later, when the second breach of the existing trust duties took place—we refer to the improper redemption (see pp. 124, 76).

Upon redemption in certificates, the City called in the certificate of sale issued, took improvement certificates from the former owner, cancelled the assessments, but failed to cancel the improvement certificates—an interesting exhibition of up-to-date financing.

It is not believed that equity will allow such a condition of affairs to go unremedied.

Two aspects of the question as to the proper construction of the Act of 1874, present themselves namely, was the Improvement Fund a trust fund? and secondly, was its collection and disbursement a trust imposed upon Long Island City?

(A) THE IMPROVEMENT FUND PROVIDED FOR BY THE ACT OF 1874 WAS A TRUST FUND.

An examination of the act shows conclusively that there was no *contractual* obligation imposed upon the City making the City legally liable to pay the Improve-

ment Certificates nor any duty imposed upon anyone to pay the certificates was directly imposed by the Fund and *this has been repeatedly held by the Courts*. Numerous adjudications were and may be cited by the defendant going to show that by this Act of 1874 no legal duty or direct contractual obligation as such to *pay* the certificates except out of the Improvement Act of 1874 upon Long Island City; but such adjudications, so far as relevant here, simply prove the complainant's contention that by the Act of 1874 the certificate holder was left without legal remedy and was relegated to his equitable right purely, *i. e.*, to have the Improvement Fund properly collected and administered, and the trust duties under said act, properly performed.

Unless then a trust fund was contemplated and created by the act the certificate holders obtained no right enforceable at law or in equity but at most a mere moral claim to the discretionary good will of the City and its officers. That the Legislature did not contemplate any such fraud appears from the precise and specific language of Section 6 of the act which explicitly directs the treasurer to place all moneys received from assessments to the credit of the Improvement Fund and keep them apart from any other funds, and to pay them out only for the purchase of Improvement Certificates except that any excess after all certificates should be redeemed should be paid to the City account (Section 11), the collection and the maintenance and disbursement of the fund for the certificate holders being specifically imposed upon the Commissioners, Assessors and Treasurer by Sections 3, 4, 5 and 7 of the Act.

At this point we cite a decision of Wood, C. J., in *Milner v. Pensacola*, F. C. 9619 (2 Woods 632), which states (syllabus) that "the construction of a

law which would impute to the Legislature a design to perpetrate an unconscionable and barefaced fraud, ought to be avoided if it could be fairly and reasonably done."

The contractor and the security holders, therefore, had no reason to assume that a trap was being laid or that the Legislature contemplated what would be a barefaced fraud upon them.

The certificate holders were very clearly in the position of bondholders under a deed of trust but without the legal right incident to bonds. So much the more therefore are they entitled to have the Improvement Fund strictly administered as a trust in compliance with the specific directions of the Legislature. The certificate holders are purely statutory *cestuis que trust* of a fund directed to be created, set apart and administered for their benefit only, until full satisfaction of their claims (Opinion, Rogers, C. J., Court of Appeals, Tr. Rec., pp. 148 *et seq.*): "We are not disposed to question that this created a statutory trust for the benefit of the certificate holders."

From the analysis of the Act of 1874 it is clear therefore that there was impressed upon Long Island City through its various officers specified therein, the duty to assess and collect a certain specific fund and keep the said fund separate and distinct from its other money or funds and use the same for the sole purpose of the redemption of the improvement certificates provided for in the said act, applying the excess of the fund over the amount required for such redemption to the payment of certain taxes levied upon the property upon which the fund was assessed and collected. No *primary* obligation was imposed by the act upon the City to pay off the improvement certificates as a direct obligation or debt of the City itself, but the City was made the express trustee for

the assessment and collection of a fund to liquidate the certificates and no property was to be exempt, for the act said, "And it is declared to be the intention of this act that the fullest power of amendment shall be vested in said Commissioners and said Assessors *so as to promote substantial justice in the matter of said assessments and in enforcing their lien and collection so that no part of the property benefited by the improvements shall be exempted from paying its fair share of the expenses thereof*" (Sec. 5).

In short Long Island City was by the act impressed with an *express* trust to create a certain fund previously ascertained in amount upon certain property; to continue the assessment as a lien against said property until the purpose for which the fund was established was fully accomplished, to keep the said fund distinct and apart from any of its other moneys or funds, to apply the said fund to the sole purpose of the payment of the improvement certificates, and to see that redemption was properly made. It would be difficult to state facts that would more clearly constitute an express trust for the collection and application of a fund than do these different provisions of the Act of 1874.

DECISIONS.

WHERE A FUND OR SPECIFIC PROPERTY IS DIRECTED TO BE COLLECTED AND SET APART AND APPLIED TO A SPECIFIC PURPOSE, EQUITY RAISES, BY IMPLICATION, AN EXPRESS TRUST TO EFFECTUATE THE INTENDED OBJECT.

In *Vickery v. City of Sioux City*, 104 Fed. 164, a case peculiarly identical with the case at bar, with the one exception that in that case bonds with added legal

liability were issued, the plaintiff had filed his bill against the City for an injunction and accounting of the fund for the payment of the bonds. It appears that the bonds were issued to pay for street improvements and it was provided in the act of the State Legislature of Iowa in that case that a fund should be collected for the payment of the bonds by levying and collecting assessments on property. On demurrer to the bill, Shiras, District Judge, ruled that the City had accepted and assumed the duty of collecting and applying the fund to the payment of the bonds and overruled the demurrer, saying in the course of his opinion on page 166:

"It is equally true that, under the provisions of the act of the general assembly authorizing the issuance of the bonds, the City assumed the duty of creating and properly applying the sinking fund provided for in the act, and to that end was charged with the duty of levying the special assessments called for by the act, collecting the same, and making proper payment thereof to the bondholders. In these particulars the City is charged with a duty amounting to a trust. *The inducement held out to the purchasers of the bonds was that payment thereof would be provided for by the levy and property abutting on the improved streets and collection of the special assessments upon the alleys, and the bondholders have the right to call the City to account for the manner in which this trust duty has been performed.* Thus, in *Taylor v. Benham*, 5 How. 232-274, 12 L. Ed., 130, it is said:

"'Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or, in equity, as a trustee, for a breach of trust.'

"In the bill filed herein it is averred that the City has failed to properly collect and apply the special assessments levied, and that it now has on hand several thousand dollars, the proceeds of the special assessments levied for the payment of the bonds in the bill described; and one object of the suit is to reach this fund, and compel its proper application in the payment of the bonds yet outstanding—a purpose which cannot be accomplished in an action at law, but which demands the more efficient power of a court of equity. The fact, therefore, that the bondholders can obtain a judgment at law against the City for the amounts due upon the bonds does not oust the jurisdiction in equity, for the reason that the judgment at law would not enable the bondholders to control the fund in the possession of the City, nor to control the action of the City with respect to the funds that may hereafter be collected from the special assessments; and therefore the legal remedy is not adequate and effectual to settle and protect the rights of the bondholders. Upon the general question of the trust relation assumed by the City with respect to the assessment, collection and application of the special assessments necessary to create the sinking fund provided for in the act authorizing the issuance of the bonds, see *Warner v. City of New Orleans*, 167 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239; *Id.* 175 U. S. 120-135, 20 Sup. Ct. 44, 44 L. Ed. 96; and *Allen v. City of Davenport*, 107 Iowa 92, 77 N. W. 532."

And again on page 168:

"When the City issued improvement bonds in pursuance of the authority conferred by the act of the 20th general assembly, and placed therein the recitals just quoted, it certainly represented to the purchasers of the several bonds that a sinking fund consisting of the proceeds of the special assessments levied upon

the property abutting on the street or portion thereof named in the bond would be created, and applied to the payment of the particular bond issued to pay for the specified improvement. The duty of creating this sinking fund and properly applying the same was assumed by the City, which thereby became a trustee; and as the bill charges past failures in the proper performance of its duties as trustee, in that the City has collected assessments that should have been applied only to the payment of the bonds held by complainant, and has otherwise used the same, and also charges that there is in the City treasury some \$28,983 collected from special assessments, and that there are other special assessments remaining yet uncollected, and that the City, unless restrained from so doing, will continue to misapply the moneys constituting the sinking fund, which should be applied only in the mode pointed out in the statute, there is good and sufficient ground for holding that the suit is one within the equitable jurisdiction of the Court, in that the purpose is to call the trustee to an account for past misfeasances, and to control the action of the trustee in the future in making disposition of the special assessment funds now in the treasury, or which may hereafter be collected on the special assessments described in the bill. Relief of this character is not obtainable in an action at law, and therefore the equitable jurisdiction cannot be defeated on the ground that complainant has a complete and adequate remedy at law." (Italics ours.)

In *New Orleans v. Warner*, 175 U. S. 120, Reaffd. in 176 U. S. 467, 170 U. S. 199, cited as authority in the foregoing case, the facts in many respects were also similar to the case at bar and in that case which came up to the United States Supreme Court on a petition for certiorari it appeared that a bill in equity

was filed by the owner and possessor of certain warrants that had been issued under and pursuant to a statute of Louisiana providing for the draining of certain lands in the City of New Orleans by Boards of Commissioners, the improvement to be paid for by levying assessments upon lands benefited; that the City of New Orleans had, by virtue of a special act authorizing it to do so, taken over the property and franchises of a private corporation which had contracted to do and had engaged in the act of draining provided for. That the City had issued bonds in exchange for a large amount of drainage warrants and had by ordinances advised property holders not to pay assessments making the drainage assessments practically valueless and uncollectable. The complainant owning drainage warrants which had not been provided for by the substitution of bonds brought this bill for an accounting of the fund on the theory that the City was a trustee to collect and disburse the fund for his benefit.

The Court held that an express trust was imposed upon the City to collect the fund and disburse it for the benefit of the warrant holders and that such express trust was not subject to the Statute of Limitations and upon the particular point now under discussion, namely, as to the duty of the City to create, collect and disburse the fund for the benefit of the warrant holders Mr. Justice Brown, in the course of his opinion, said, on page 129:

"In respect to this we adhere to the opinion pronounced by us when this case was first before this Court, that the City in respect to this purchase acted *voluntarily*; that it was not, as had been held in the former case of *Peake v. New Orleans*, 139 U. S. 342, with respect to other warrants, a compulsory trustee, but a voluntary contractor; that as the fund was to

be partly created by the performance by the City of a statutory duty, it could not deliberately abandon that duty, or take active steps to prevent the further creation of the fund, and then plead a prior issue of bonds as a reason for evading liability upon the warrants. As the City had paid for the property in warrants drawn upon a particular fund, it was under an implied obligation to do whatever was reasonable and fair to make that fund good. Certainly it could not so act as to prevent the fund being made good, and then require the vendor to look to the fund and not to itself."

And again, on pages 131 and 132:

"We deem it entirely immaterial whether the assessments against the City for the drainage of public property were reduced to judgments or not. When put in this form they were none the less obligations of the City—debts which it owed to the drainage fund—was bound to treat as assets collected, and such as were held by it as trustee for the benefit of the warrant holders. *Perry on Trusts*, Sec. 440; *Stevens v. Gaylord*, 11 Mass. 256; *Sigourney v. Wetherell*, 6 Met. (Mass.) 553, 557; *Leland v. Felton*, 1 Allen 531, 533. The debts of private owners it agreed to use due diligence to collect, *and as to these it was a trustee*. Its own debts it was bound to pay, and as to these it was equally a trustee. By reducing its own claim to judgment it neither ceased to be debtor nor trustee." (Italics ours.)

In the above case of *Warner v. New Orleans*, it will be noticed that a distinction is made between a voluntary and compulsory trustee and *Peake v. New Orleans*, 139 U. S. 342 (in which case was involved the same matter of drainage certificates issued in connection with the draining of swamp lands in New Orleans), was distinguished on the ground that the

drainage certificates involved in the *Warner* case were in a different position from the drainage certificates involved in the *Peake* case.

In the *Peake* case Mr. Justice Brewer, while holding (p. 352) that a trust was imposed upon the City, nevertheless held that the City was in the position of a compulsory trustee as regards the particular drainage certificates then involved and that its trust duties were to be construed strictly and that by reason of the fact that it had no discretion regarding the terms of the contract made by the private corporation authorized to do the draining by the statute and further that every effort had been made to collect the fund which had failed by reason of the worthlessness of the swamp lands—the City was to be relieved as regards those particular drainage certificates there involved, the *Warner* case, however, subsequently holding that the City was not to be relieved of its trust duties in regard to the particular drainage certificates involved in the latter case.

In the *Peake* case the Court said that the responsibility of the City should be narrowed, because it was "denuded of all freedom of action. It had no choice of contractor or price. * * * No superintendence of the financial department whether as to the property to be assessed, the amount of the assessment or the collection thereof, was intrusted to the municipality. * * * Thus denuded of freedom of action, it may properly insist upon the narrowest limits of responsibility"—not so here. As there pointed out, the *failure* by an administrative board to levy could be reached by mandamus. But in the instant case, the improper conduct was not in the nature of a failure to levy, but in improper selling and redemption after levy was made.

Whatever may be thought of the distinction it is

immaterial in the case at bar for the reason that whether the City be regarded as a compulsory or voluntary trustee it did accept the benefit and had full discretion in making the contracts with the lowest bidders and had every opportunity to collect the fund from very valuable property, and no special considerations have been raised justifying its relief from the performance of its trust duties.

If, however, *Peake v. New Orleans*, *supra*, should be considered as in conflict with *Warner v. New Orleans*, *supra*, the latter case has been repeatedly reaffirmed in a manner amounting to a virtual overruling of the *Peake* case by the following cases, to wit, *Warner v. New Orleans*, 167 U. S. 467; *New Orleans v. Warner*, 176 U. S. 92; *New Orleans v. Warner*, 180 U. S. 199.

In *Jewell v. City of Superior*, 135 Fed. 19, the City under charter authority issued certain bonds for the improvement of certain avenues and levied assessments for the purpose of paying for the improvements for which the bonds were issued. The funds received from the assessments were, in violation of the statutory provisions, mixed with other funds and deposited in bank and lost. The complainant owning certain bonds brought suit for an accounting with respect to the fund in question, asking for a decree for the funds collected and also for the amount of its bonds and coupons irrespective of the funds collected, subsequently waiving the second claim. The Court granted a decree for the complainant by limiting his recovery to his pro rata amount of the fund and the complainant appealed on the ground that the Court was unwarranted in limiting his recovery as it did.

The Circuit Court of Appeals affirmed the decree, holding that the assessment fund must be considered a trust fund both for the purpose of protecting the

complainant and as well for the purpose of limiting his rights (subsequently denying a motion for re-hearing) and saying on page 22:

"The municipality is statutory trustee for collection, bound to the exercise of due diligence according to law, enforcing the lien through municipal machinery as agents for the owners of the bonds, and answerable for failure to perform this duty or in paying or in failing to pay the money collected. New Orleans v. Warner, 175 U. S. 120, 132." (Italics ours.)

In *City of Galena v. Amy*, 5 Wall. 705, where a City was given the power to levy a tax to pay its funded debts it was held, at page 708:

*"The right of the creditor and ends of justice demand that it should be exercised in favor of affirmative action and the law requires it. In such cases the power is of the nature of a trust for his benefit and it was the plain duty of the court below to give him the remedy for which he asked. * * *"*

In *Mather v. City and County of San Francisco*, 115 Fed., 37, an action at law was begun to enforce collection upon certain bonds issued to pay for the widening of certain streets, the bonds to be redeemed out of a sinking fund collected by assessments against property benefited. *The act of the Legislature under which the bonds were issued required that the City and County of San Francisco should be free from direct legal liability on the bonds.*

On demurrer to the bill, in holding that the City irrespective of this legal liability must account for its administration of the trust imposed upon it to collect and administer the fund for the redemption of the bonds, Gilbert, C. J., said in the course of his opinion on page 41:

"The ground upon which the right to bring suit against the county in the three decisions we have referred to was maintained was not that the county was under obligation to pay the bonds, or was in any way liable for the debt which they represented, but upon the ground that the bonds were in form the bonds of the county, and a duty had been imposed upon the county with reference to the payment thereof. Although the debt was in each case primarily in the debt of the township, the county stood in such relation to the township and to the bonds as to require the exercise of its official authority in the matter of levying, assessing, and collecting taxes wherewith to pay the bonds. We think the present case comes clearly within the principle of those decisions. The provision in the act of the Legislature that the City and County of San Francisco shall not be liable for the debt created by the bonds *does not absolve it from responsibility to provide the means for the payment of the bonds in the manner prescribed by the act.* The counties which were the defendants in the suits above mentioned were not liable in any way for the payment of the bonds or the debts thereby represented, *yet they were under obligation to provide a fund for the payment.* The provision in the act exempting the City and County of San Francisco from liability for the debt means only that the debt is not the debt of the city and county, and is not enforceable against it as such. It does not mean that the city and county has received legislative authority to refrain from doing the very things which the act of the legislature commanded it to do. *The Legislature certainly did not intend that the bondholders should have no remedy on their bonds.* As was said by Judge Dillon in *Jordan v. Cass Co.*, 'Undoubtedly the Legislature designed there should be a remedy upon these bonds.' The means provided by

the Legislature for the payment of these bonds is plainly pointed out in the statute. Assuming, as we must, upon the demurrer, that the averments of the bill are true, it is clear that the defendant in error has been remiss in the performance of its duty. The bonds have not been paid for the reason that the fund for the payment thereof has not been created as the law required that it should be created. The present suit has no other aim than to compel the defendant-in-error to do what it ought to do, and what the act required it to do." (Italics ours.)

So we claim that the Legislature did not intend to deprive complainant and other certificate holders of the only remedy they had on their bonds—that is the maintenance of the integrity of their liens.

In *Fletcher v. Morey*, F. C. 4864 (2 Story, 555), Mr. Justice Story in holding that certain shipments must be impressed with a trust for the payment of certain credits and advances which had been made, in the course of his opinion said:

"In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem*, not only upon real estate but also upon personal estate or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself and his personal representatives and against any persons claiming under him voluntarily or with notice, and against assignees in bankruptcy who are treated as volunteers; *for every such agreement for a lien or charge in rem constitutes a trust and is accordingly governed by the general doctrine applicable to trusts.*" (Italics ours.)

And, further, as illustrating the extent of the equity jurisdiction of the Federal Courts:

"in short, it has been long since settled in the courts of the United States that the equity jurisprudence administered in the courts of the United States is co-incident and co-extensive with that exercised in England and is not regulated by the municipal jurisprudence of the particular state where the Court sits. This was expressly decided in *Robinson v. Campbell*, 3 Wheat. (16 U. S.) 212, 220 and *U. S. v. Howland*, 4 Wheat. (17 U. S.) 108."

That where specific property is by reasonable interpretation of oral or written agreements of parties to be devoted to specific purposes an *express trust* is raised by the law of New York and elsewhere is further illustrated by the following authorities:

Fowler's Real Property Law of the State of New York, 3rd Ed. pages 438-440.
Amer. and Engl. Ency. of Law, 2nd ed. vol. 28, pages 905-6.
Matter of Carpenter, 131 N. Y. 86.
Baldwin v. Humphrey, 44 N. Y. 609, page 616.
Jewell v. City, *supra*.
Amy v. City, 7 Fed. 163,

especial attention being called to the last two cases.

In *Hamer v. Sidway*, 124 N. Y. 538, 550, the Court said:

"No particular expressions are necessary to create a trust."

In *Maenhardt v. New Orleans*, F. C. 8939, (2 Woods 108), Woods, C. J., said as follows:

"Dillon, in his learned work on municipal corporations says in Section 729, 'in respect to property held by municipal corporations in trust or clothed with public duties equity has always asserted its jurisdiction to see that the

trusts were performed and public duties discharged.'

"Adding, 'The Court of Chancery will always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity,' citing cases."

(B) THE TRUST TO COLLECT AND ADMINISTER THE FUND FOR THE PAYMENT OF THE IMPROVEMENT CERTIFICATES, WAS IMPOSED BY THE ACT OF 1874 UPON LONG ISLAND CITY IN ITS CORPORATE CAPACITY.

It being established that a trust was created by the Act of 1874, upon whom as trustee by a proper construction of the Act was the trust imposed?

The Act clearly and expressly contemplated the improvement of certain streets of Long Island City, explicitly requiring in Section 2 that the City acquire title to the streets before the improvements should be made. The Act further provides that the Street Commissioners of Long Island City acting with the same power as the Common Council of the City and under the supervision of the Mayor should make the improvements through contractors by contracts entered into pursuant to bids, issue the Improvements Certificates in payment, and should estimate and certify the cost to the Board of Assessors of the City, who in turn should assess adjacent property and make up an assessment roll and file the same with the City Treasurer, who should receive payment of the assessments, selling the property assessed after ten years if necessary, and who should keep the fund so raised apart and distinct from other money and apply the same solely to the payment of the Improvement Certifi-

cates until they were fully paid, thereupon turning over any excess to the City funds, and to be liable to the City in the usual way on his official bond for due performance of his functions.

There is only one alternative construction to be placed on these provisions, either the trust was imposed upon the incumbents for the time being of these different offices and boards or it was imposed upon the City acting through its different corporate officers specified by the Act for the performance of different functions. The only reasonable construction of the Act is the latter alternative and the City specifically taking the benefit took also the burden of the trust.

This conclusion, manifestly the reasonable interpretation of the language of the Act, is borne out and corroborated by abundance of authority in cases of practically identical similarity.

The duties in terms imposed upon the City Treasurer and Receiver of Taxes were therefore obligations of Long Island City to be performed by its officers (Point 8, *infra*), and that they were *continuing* appears from what we have said at pp. 28, 66 and 67.

It has been repeatedly and positively determined by the Courts in questions arising out of legislative enactments so similar to the Act of 1874, as to be practically identical with it that directions and provisions in such enactments requiring a particular officer or different officers or boards of a municipality to perform duties or enter into contractual obligation in matters involving municipal improvements or other benefits to the municipality, are so directed to such officers as agents of the municipal corporation, and that the municipal corporation receiving whatever benefit may accrue from the acts done pursuant to the legislative enactment by such officers or Boards is burdened as the principal of such officers and Boards acting as its agents to require due performance by its

agents of the duties and obligations imposed by such legislative enactment.

In *Sage et al. v. City of Brooklyn*, 89 N. Y. 189, a case in many respects similar to the one at bar, the Legislature had, by Chapter 631 of the Laws of 1886, authorized the Commissioners of Prospect Park to open, grade and otherwise improve Sackett Street in the City of Brooklyn, the expense of the improvement to be charged upon a certain limited assessment district; the 16th section of the Act providing

"the City Comptroller shall pay to the persons to whom damages may have been allowed, the amount of such damages."

The plaintiffs having been awarded certain damages to their property and not having been paid, brought action against the City of Brooklyn for the amount of the award; and the City denied its liability asserting that it owed no duty to pay the plaintiffs for their lands, that the widening of Sackett Street was a state and not a municipal improvement and that the only special relation which the City sustained to the award to the plaintiffs grew out of the fact that the state for its convenience availed itself of certain existing municipal agencies to collect and pay over the assessments to the parties.

The Court both below and above held that the duty and obligation was imposed upon the City of Brooklyn in its corporate capacity, Andrews, C. J., in the course of the opinion of the Court of Appeals, saying at page 196:

"The claim that the opening and widening of Sackett Street is a state, as distinguished from a municipal improvement, is opposed to the inferences flowing from the nature and object of the improvement, its connection with the system of parks in Brooklyn (of which it is an adjunct), and from the provisions of the

act itself. The State, it is true, took the lands required for the widening of Sackett Street by direct legislative enactment (Sec. 1). It also committed to the park commissioners the initiation of the proceedings for opening the street, investing them, for that purpose, with the powers which, under the general law relating to street openings in Brooklyn, are conferred upon the common council (Secs. 4, 5). The act also placed the street, when opened, under the exclusive control and management of the park commissioners (Sec. 11). But these provisions are not inconsistent with the theory that the opening of Sackett Street was a City improvement. The same features are found in the Prospect Park Act of April 17, 1860. The Legislature, in that act, declared certain designated lands 'to be a public place to be known as Prospect Park' (Sec. 1); the park was placed under the exclusive control and management of the park commissioners (Secs. 16, 18), and by the third section it is declared that the lands 'shall be deemed to have been taken by said City of Brooklyn for public use: By other provisions the City was to be vested with the fee of the lands taken, upon payment being made therefor. A municipal corporation is the creature of the state, deriving its public faculties and political powers from the Legislature. The Legislature may, in place of remitting the question to the discretion of the City authorities, prescribe what local improvements shall be made, and create special agencies for their execution. It is not required to commit their execution to the ordinary representatives of the municipal body; and it may charge the expenses of such improvements upon the locality. It does not, therefore, go far toward establishing the claim that a street improvement within a city is a state and not a municipal work, to show that it was directed by the Legislature, and that its execution was committed to special agents appointed by the legislative act."

And again at page 200:

"It is clear, we think, that the duty imposed by Section 16, is a duty imposed upon the corporate body—the City, and not, by a *descriptio personae*, upon the individual who may happen to be comptroller. The comptroller could not as an individual execute the directions given. He is, by the charter, the chief financial officer of the City. But he neither receives nor has the custody of money received from local assessments. The charter requires that the collector shall pay the money collected thereon to the City Treasurer, who is required to deposit it to the credit of the City in such banks as the common council may direct. (Laws of 1854, Chap. 284, title 3, Sec. 15, title 5, Secs. 11, 15.) And it prohibits any money being drawn from or paid out of the treasury, except in pursuance of orders of the common council appropriating the same and upon warrants signed by the mayor and countersigned by the treasurer and city clerk. (Title 3, Sec. 15.) According to common understanding, a direction to the chief financial officer of a city, state, or of the general government, to pay money for a public purpose, is a direction that the state, government or municipality pay the sum stated. This is especially so in a case like this, where the direction is found in a charter act, and relates to a duty of a public character. (N. Y., etc., Lumber Co. v. Brooklyn, 71 N. Y. 580)"

Further, the attention of the Court is called to the case of *Astoria Heights Land Company v. City of New York*, 89 A. D. 512; aff'd, 179 N. Y. 579, in which it was held as above pointed out that the said improvement certificates do not or did not constitute a primary obligation on the part of the City itself to pay, a position that the complainant herein has never taken. The Court did point out clearly in

the opinion that no power existed to destroy the fund provided by the statute for the redemption of the certificates and upon the faith of which the latter were issued, saying:

"Has the Court any power, in the absence of the certificate holders, to destroy the fund provided by the statute for the redemption of the certificates and on the faith of which the certificates were negotiated and the means procured with which the work authorized by the statute was begun and prosecuted almost to completion";

referring with approval to the decision in *Koelgesch v. City of New York*, 34 A. D. 98, as follows:

"The learned Court also affirmed the proposition that 'where a public improvement is made under the auspices of a municipal corporation, where the fund for the payment of the same is to be derived from assessments against the property benefited, no primary obligation against the municipality is created,' but that 'where a municipality has neglected to perform the duties' imposed by law it becomes directly liable to the party aggrieved."

The case of *Koelgesch v. City of New York, supra*, is very much in point. There the Court below found:

"That during the year 1897, the general improvement commission of Long Island City was a duly organized board of said Long Island City, and that a majority of such board had full power and authority to purchase supplies for the work of said board, and with the approval of the Mayor, to issue warrants upon the City Treasurer of Long Island City, in payment thereof; that prior to the 31st day of December, 1897, said general improvement commission purchased of the plaintiffs herein, certain supplies of the value of \$279.70, in payment for which said board did on said

31st day of December, 1897, duly issue to the plaintiffs four certain warrants upon said City Treasurer of Long Island City for said sum of \$279.70, which said warrants were on the same day duly approved in writing by Patrick H. Gleason, Mayor of said City of Long Island, and were then duly delivered to these plaintiffs; that said warrants were not paid, nor was any part thereof. * * *

Upon appeal it was said:

"It will not be disputed, as a general proposition, that where a public improvement is made under the auspices of a municipal corporation, where the fund for the payment of the same is to be derived from an assessment against the property benefited, no primary obligation against the municipality is created * * *. It is equally well settled, however, that where the municipality has neglected to perform the duties imposed by law, the plaintiff may not be unreasonably deprived of his compensation, but may proceed against the municipality which is ultimately responsible for the debt. 'In making contracts with others in execution of the powers bestowed upon it,' says the Court in the case of *Beard v. City of Brooklyn* (31 Barb. 142, 151), 'no liability will be created so long as it acts within the scope of its authority and with usual and reasonable diligence. But it cannot with impunity enter into contracts with individuals by which they are induced to spend their labor and substance in works of public improvement and then refuse or negligently omit to employ the means given it by law for their recompense and reimbursement.' The same doctrine is asserted in the case of *Baldwin v. City of Oswego* (2 Keyes [N. Y.] 132), the Court relying upon the case of *Cummings v. The Mayor, etc., of Brooklyn* (11 Paige, 596)."

Continuing it was said:

"In the case at bar, the Common Council of Long Island City, acting with the Mayor was authorized to issue bonds * * *. The general improvement commissioners, acting upon this idea, issued to the plaintiffs warrants upon the City Treasurer of Long Island City on the 31st day of December, 1897, and *it became the duty of the Common Council, in conjunction with the Mayor, to provide the money for the payment of these warrants.* This duty, it appears, was neglected and on the following day, by operation of Chapter 378 of the laws of 1897, the City of New York succeeded to all of the rights and powers and assumed all of the obligations of the City of Long Island City and of the general improvement commission of Long Island City." (Italics ours.)

The City of Long Island City was held to be in default and New York City held liable, for: "To hold otherwise is to deprive the plaintiffs of all remedy, and to relieve the City of New York of one of the obligations which it assumed * * *."

In *Genet v. City of Brooklyn*, 94 N. Y. 645, Chap. 631 of the Laws of 1868, for the widening of Sackett Street in the City of Brooklyn, construed in *Sage v. City of Brooklyn, supra*, was again under discussion, Andrews, J., in the course of his opinion said, at page 645:

"The case of *Sage v. City of Brooklyn* (89 N. Y. 189), decided after the decision of this case, fully meets this point, and holds that the act did impose a direct liability upon the municipality to pay the awards made in the proceedings, and upon this ground the Court sustained the constitutionality of the act. Upon the case as now presented, therefore, the plaintiff was not entitled to have the assessment set aside, and this relief was properly refused.

"In disposing of the other question, to wit, the claim of the plaintiff for judgment against

the city for the amount of the award, the Court based its decision upon two propositions: *first*, the lands taken for the widening of Sackett Street were not taken by the city, and *second*, that the city was subjected to no liability for the payment of the award. The case of *Sage v. City of Brooklyn*, decides both of these propositions adversely to the defendant. It was held that the improvement was a municipal improvement, and also, as before stated, that the city became liable to pay the awards to the land owners. The judgment of the Court denying the plaintiff's right to a judgment for the award cannot be supported on the grounds upon which it proceeded, and we think the case for this reason must go back for a new trial."

One of the cases much in point is *Beard v. City of Brooklyn*, 31 Barb. 142, where it was held as follows, quoting from syllabus:

"The authority given by its charter to the corporation of the City of Brooklyn, to open and grade streets and avenues, is a most vital and valuable part of the sovereign power of the state, and the common council is accountable for the manner of its exercise.

"It cannot institute proceedings to open and grade streets, etc., and through mere negligence and inattention leave them imperfect and incomplete, to the detriment and injury of individuals. * * *

"It cannot with impunity, enter into contracts with individuals by which they are induced to expend their labor and substance in works of public improvement, and then refuse, or negligently omit, to employ the means given it by law, for their recompense and reimbursement. Thus, if, after having entered into a contract with an individual for graduating, regulating and forming an arch in an avenue of the city, and the contract has been fully performed by the contractor, the common council neglects to lay, confirm and collect the assessment for the

cost of the work, an action, substantially on the case for negligence, will lie against the corporation, in favor of the contractor."

In the cited case an action was brought by plaintiff, as assignee of the contractor, on a contract for the construction of an arch in Clinton Avenue, the complaint urging, p. 143, that "the defendants agreed to cause due diligence to be used in laying, confirming and collecting the assessment for the cost of the work, but that they failed to do so; whereby the said assessment has not yet been collected."

In *Fleming v. Village of Suspension Bridge*, 92 N. Y. 368, the Board of Water Commissioners of the Village of Suspension Bridge entered into a contract with the plaintiff to build certain water works for the village, and the plaintiff subsequently brought suit against the Village of Suspension Bridge to recover for certain extra work which he claimed had been contracted for; the village set up as a defense that the Board of Water Commissioners had not entered into a contract binding the village and had no power to do so. In the Court above, judgment for the plaintiff was affirmed, the Court holding that the act of the Board was the act of the village, Earl, J., in the course of his opinion, saying on page 372:

"It will thus be seen from this analysis of the act that the Board of Water Commissioners is not a corporation. There is no provision in the act authorizing the Commissioners to sue or to be sued as a board. The board is at all times composed of the trustees of the village, and the water Commissioners are manifestly the agents of the village. The water works are a local improvement, exclusively for the benefit of citizens of the village. They are to be constructed upon the credit of the village, are to belong to it when constructed, and the title to all the lands taken is vested in

it. The rents received for the use of the water belong to it, and the entire expense of constructing the water works is a charge upon it. It was, therefore, immaterial whether in making this contract the water Commissioners made the same in the name of the village, as they did, or in their own official names as water Commissioners, or as a Board of Water Commissioners. The village became bound by their act, and for this conclusion the cases of *Appleton v. The Water Commissioners* (2 Hill 432); *Bailey v. The Mayor, etc., of New York* (3 id. 531; s. c. 2 Denio 433), and *Sage v. The City of Brooklyn* (89 N. Y. 189), are ample authority. *Any other construction of the act might practically leave a contractor performing the work without any remedy.* It is expressly provided that he shall have no remedy to be enforced against the individual property of either of the Commissioners, and if he has no remedy against the village, it would be quite difficult to see how payment for work done under the act could be enforced. It is clearly to be inferred, from the fact that the Commissioners are exempted from individual liability, that it was the intention of the Legislature to impose the liability upon their principal, the village." (Italics ours.)

Similarly:

Davidson v. Village of White Plains, 197 N. Y. 266.

King v. Village of Randolph, 28 App. Div. 25.

Rodgers v. Coler, 166 N. Y. 1.

New York, etc., Co. v. City, 71 N. Y. 580.

Quill v. Mayor, 36 A. D. 476.

Jones v. Town of Lake View, 151 Ill. 663.

The People ex rel. v. Gage, 83 Ill. 486.

POINT 3.

The Trustee, Long Island City, committed various breaches of its trust duties, resulting in a failure of the fund and the practical destruction of the value of a large amount of outstanding certificates.

By adverting to the Act of 1874 it will be recalled that the Street Commissioners of Long Island City and the assessors were, by said Act to establish and collect a fund for the payment of the improvement certificates by means of assessments levied against the property abutting the streets to be improved; that in Section 4 of the Act it was expressly provided that each such assessment with interest at 10% was to continue to be a lien against the property assessed until it was fully paid, the exact language being "and thereafter such assessment is to be a lien upon the property assessed with interest at 10% until fully paid." And in Section 5 it was further provided that the Commissioners and Assessors were to have full power of amendment for the express purpose of promoting justice in the matter of the assessments and enforcing their lien and collection, the exact language being: "And it is declared to be the intention of this Act that the fullest power of amendment shall be vested in said Commissioners and said Assessors so as to promote substantial justice in the matter of said assessments and in enforcing their lien and collection, so that no part of the property benefited by the improvements shall be exempted from paying its fair share of the expenses thereof, but that the whole of the said expenses shall be borne equitably by all."

Further, in Section 7 of said Act, it is provided that all certificates received by the Treasurer, purchased or surrendered under the Act, shall "be forthwith effectually and permanently cancelled and defaced."

These provisions in the statute for the maintenance of the lien of the assessments until the assessments were fully paid with interest are positively mandatory and necessarily so as affording the only effectual protection to the certificate holders. As also is the provision in the statute mandatory that all certificates received by the City Treasurer should be effectually cancelled and defaced.

In these essential particulars the record before the Court in testimony and documents shows that Long Island City, through its treasurer, committed gross breaches of trust in both particulars.

In the matter of the cancelling of certificates there is undisputed evidence (Tr. Rec., pp. 42, 43), indicating a regular practice, for which there is no authority in any subsequent enactment of reissuing certificates received instead of cancelling the same in accordance with the requirements of the statute of 1874 (we call to the Court's attention that appellee took no testimony and has not attempted to dispute the evidence in the case).

The two main breaches of trust, however, upon which the complainant relies and which are clearly shown by the uncontradicted evidence are (1st) that the Treasurer of Long Island City sold at various times in 1892 and 1893, very numerous parcels against which these assessments had been levied, for much less than the amount of the assessment, resulting in great depletion of the improvement fund and a practical destruction of the value of outstanding improvement certificates—generally from 2 to 40% of the assessment (Tr. Rec., p. 128) he also unlawfully al-

lowed redemption after sale for unpaid assessments in certificates at par thereon; (2nd) reissuing certificates of indebtedness received on redemption, instead of cancelling them—this breach occurring from time to time and as late as 1913 (Tr. Rec. pp. 78, *et seq.*).

As to the (1st):

On page 44 Tr. Rec., etc., of the testimony, it was testified to by Mr. Clay, the assistant engineer of the Commission, that he was present at the sales of 1892 and 1893, and personally knew that the lands were sold at said sales for less than the amount of the assessment liens and that he did not "know of a single case where they were sold for more." He further testified that after the sales were completed there was a large quantity of certificates of indebtedness outstanding, amounting to approximately \$300,000, par value.

Further, in the testimony of Mr. Remcke on page 16, etc., Tr. Rec., it appears that the total amount of overbids on assessment sales in 1892 was \$62.69 and the total amount of underbids on sales was \$1,111,279.25 (Exhibit II, p. 112), the total number of lots sold being 2,011. Furthermore, from the testimony of Mr. Wanninger, page 75, but more specially on page 76, it appears that at the sale in 1892 the property brought from 2 to 40% of the assessment and that after the completion of this sale there were about \$300,000 of unpaid improvement certificates outstanding.

Mr. Clay further testified (p. 40) that he protested to the City Treasurer so conducting the sale and stated "that the property should not be sold for less than the accumulated liens against it," and that he himself bought in lots "for about one-third of the accumulated amount of tax and interest" advising the City Treasurer that he "was in pocket" through the manner the

City Treasurer had conducted the sale. This method of conducting the sale shows clearly that the owner of property assessed did not (coupled with his right of redemption) pay the "fair share" of the expense of the improvement as contemplated by Section 5 of Chapter 326, Laws 1874, placing a premium on the owner's delay in making payment. Mr. Clay testified (p. 45 of Record) that as a result of this method of conducting the sale "the improvement certificates became a drug on the market and little or no call was made for purchases of these certificates," or, as he elsewhere stated: "It caused the improvement certificates themselves to become virtually unmarketable" (Tr. Rec. p. 50); and that the market value of these certificates fell from 50c. to 25c. on the dollar; that at the time when he was an employee (p. 47) the certificates were worth 90c. to 95c. on the dollar, and later on in 1902 went down to 25c.

Mr. Kearney testified (p. 69) that he was a partner in Farwell, Sage & Co., the principal contractors, and that the market value of these certificates before 1892, the time of the sale, was from 60c. to 90c. on the dollar (p. 70), they being worth more before the sale than after; that he had dealt in them from 90c. on the dollar before the sale, to 15c. on the dollar after (p. 71); and that he did not know of their having any market value at the time he testified; his information being obtained in dealing in "considerably over a million dollars of them" (p. 71).

Mr. Wanninger testified to being present at the sale in 1892 (p. 72) and protesting to the City Treasurer against conducting the sales for less than the amount of the assessments (p. 73), etc. and as illustrating the practice testified to one lot of land (p. 76) assessed at \$1,560.25 being sold for \$400 in cer-

tificates although an offer was made for \$300 in cash, combined with the proposal to sell certificates at 30c. on the dollar. He testified (pp. 77 *et seq.*) that there was no further market for these certificates, and that he himself (p. 79) bought 40 lots in 1892, the amount of the assessment with interest amounting to \$55,203.01, for \$35,690.23, in certificates, that is, in certificates the par value of which was \$17,040, the excess being principally interest due upon the certificates. But he further testified (p. 80) that when the City Treasurer made the announcement that he intended to sell the property for the highest bid that "the property sold for less than the amount of the assessment and was really slaughtered" because "it was sold for from one-half to one-twentieth of the amount of the assessment due thereon"; adding that although he protested time and time again against the method of selling the property, the City Treasurer replied that "they wanted to get rid of the whole thing," that is "they wanted to sell it out."

The evidence and documents in the case therefore clearly show that the City through its different officers particularly its treasurer did in various instances violate its express duty to collect the fund and maintain it for the benefit of the holders of the improvement certificates in that the City allowed at the various times above specified, various parcels of land against which assessments had been made, to be sold for very much less than the amount of the assessment and thereby destroyed the lien of the assessment against those lands which lien the City was expressly directed by the Act of 1874 to continue intact until the various assessments were paid in full.

It appears from the testimony of Wanninger (Tr. Rec. pp. 78, *et seq.*) that the City was still allowing redemption (that is acting as trustee) as late as 1913,

some three years after this action was started; for he said that the City of New York, the successor, was allowing a redemption in 1899 and again in 1905, and again in 1913, certificates of indebtedness being used in redemption. As a matter of fact the City of New York as well as its predecessor has constantly been assuming to act as trustee by recognizing and allowing redemption, recognizing the past relationship (*City of New Orleans v. Fisher*, 91 Fed. 574), which held that redemption could not happen "as long as the trust relationship continues."

The complainant and other certificate holders now call upon the direct successor in interest of Long Island City to account and restore, for the redemption of the improvement certificates, the fund which it was the express duty of the City to create and which has thus been lost and destroyed by reason of neglect of duty on the part of the City's agents. The only conceivable defense possible for the City to maintain upon this point is to contend that its failure to maintain the trust fund was in some way authorized by the Act of 1874 itself. If it cannot go the full length of maintaining that position its defense falls since whatever authorization may have been subsequently given to the City by statute or otherwise, assuming that there were such, to depreciate in any way the liens of assessments or the amount of the trust fund, would, unless authorized by the Act of 1874 itself, be in violation of the Constitution of the United States. And the reason for this is that the certificate holders, taking these certificates under and pursuant to the agreement made in behalf of the City by the Legislature in the Act of 1874, became entitled to have the contract and the express trust thereby created, fully performed and the obligation of the City or his security in no way impaired by statute or otherwise. It is apparent that the Treasurer of Long Island

City at the time the sales were made sought to give his action an appearance of justification by claiming that he was conducting the sales of these lands so assessed in compliance with the General Tax Law of New York, passed in 1886, known as Chapter 656, maintaining that that law authorized the City to sell lands at tax sales for less than the tax assessments and also authorized lands so assessed to be sold for less than the amount of the assessment.

It therefore becomes incumbent upon us to show what is the proper construction and real effect of the Act 1886 upon this question before the Court.

POINT 4.

The Act of 1886 affords no justification or warrant for the breaches of trust in depleting the fund for the payment of the improvement certificates.

The Act of 1874, in Section 4, specifically provided as before stated that assessments for the Improvement Fund were to remain a lien "upon the property assessed with interest at 10% until fully paid" and in Section 5 the Commissioners and Assessors were given fullest power of amendment to effectuate the collection of the assessments.

Unless these two requirements of the Act of 1874 be disregarded or nullified it seems clear, reading the Act of 1874, regardless for the moment of subsequent legislation, that it could not be considered as contemplating the sales of assessed property, fully relieved of the lien, for less than the assessment and 10% interest.

Is there anything in the Act of 1874 nullifying these express requirements? It is nowhere contended that there is any express nullifying provision, but it has been contended that there was implied authorization permitting a subsequent alteration of the law authorizing sales for less than the assessment. In Section 5 of the Act of 1874 providing for sales of lands for unpaid assessments the language is "such sales shall be the same and on the same notice and like terms" as *tax sales* and "the costs, fees, charges and expenses of such sale shall be the same as shall then be prescribed by law" for the tax sales.

It was contended by our opponents before the District Court that the Act of 1874 by the provision in Section 5, for the sale of lots on the same notice and like terms as the sale of lands for nonpayment of City taxes, would in itself authorize the sale of lots for less than the assessments against them whenever the law for the collection of city taxes should allow such sale of lands for less than the amount of the tax assessment, whether such law were in force at the time of the passage of the Act of 1874 or subsequently; and that by the general tax law of 1886 the City was allowed and authorized to sell lands at tax sales for less than the tax assessment and that therefore from 1886 on the argument could be maintained that the City could sell these lots against which assessments were made for the benefit of the improvement fund to redeem the improvement certificates, for less than the amount of the assessment. As is pointed out hereafter, the Act of 1886 properly construed did not authorize such tax sales for less than the tax assessment. But whatever may be the proper construction of the Act of 1886 in that respect, *it is earnestly insisted that the Act of 1874 cannot be construed to permit by its express authorization*

any such modification of the law as governed the sale of the lots against which the assessments were made, for the reason that Sections 4 and 5 are very explicit that the lien of the assessments shall continue until they are paid with interest and that whatever amendment may be made shall be for the purpose of the enforcement and collection of the liens. To adopt any other construction would be to say that the statute in express terms required that the lien of the assessments should be maintained, enforced and collected, but that by referring to the tax sales the Act of 1874 by veiled inference permitted a subsequent alteration in the method of tax sales to work a destruction of the express lien that the statute explicitly required should be maintained. Whether therefore any construction of the statute of 1886 authorized assessment sales to be made for less than the assessment, or not, it seems very clear that the express trust created by the Act of 1874 to protect the contractual obligations of the certificate holders, was created by and rested on the language thereof secured by the explicit requirement of that Act for the maintenance and continuance of the assessments until they should be fully paid. Therefore this trust could not and cannot by any process of forced construction be impaired and destroyed by a veiled reference to the possibility of such a subsequent statute in the face of the explicit requirement of the Act itself, that the lien of the assessments should be maintained and continued.

The word "then" used in Section 5, that the sale shall be made by the officer "then" charged, etc., with its subsequent use, referring to costs, etc., of sale; emphasizes its intermediate omission as to the "terms" of the sale and indicates that the law in force in 1874 governed such "terms," following a familiar rule of construction.

In *Cable Co. v. Railway Co.*, 89 Fed. 190, 194, it was said:

"The general rule unquestionably is that when a statute refers to and adopts an existing law its purport is confined to the law as it then exists and does not enhance or include any subsequent modifications of it."

Can these provisions be construed to authorize a subsequent change in the statute law so as to permit sales of lands for less than the assessments in the face of the express requirements that the lien of the assessments should continue until fully paid?

Since the assessments provided the only means for the payment of the Improvement Certificates, would contractors have been found to take Improvement Certificates if there had been an express provision in the Act of 1874, authorizing the lands to be relieved of the assessments before the latter were fully paid? While not impossible, the improbabilities is great.

Squarely in point in support of our contention that in making the sales for the nonpayment of the assessments provided for by the Act of 1874, such sales were to be conducted as the law then stood, is the decision in *Ramish v. Hartavell*, 126 Cal. 443 (58 Pac. 920).

In this case, bonds were issued for street improvement work under the statute of February 27, 1893, which provided for the sale of land in order to satisfy the amount of the bond in case of delinquency in its payment, that

of land by proceedings in all respects the same "the City Treasurer shall have and shall act thereafter with all the powers and duties of the tax collector in the collection of unpaid State and County taxes and shall forthwith proceed to advertise and sell said lot or parcel

as are provided by law for the collection of delinquent State and County taxes."

At that time, the Political Code provided, that (as the Court said) :

"In cases of delinquent State and County taxes, the tax collector should sell the real estate of the delinquent, upon which the taxes were a lien at public auction, to the person who would take the least quantity of land and pay the taxes and costs of sale, and that in case there should be no redemption therefor within a year, the purchaser should be entitled to a deed of conveyance of the land so purchased."

This act was amended in 1895, by providing that (opinion of Court) "instead of selling the land at auction, the property upon which the taxes are delinquent 'shall by operation of law and the declaration of the tax collector be sold to the State, and said tax collector shall make an entry "sold to the state," on the delinquent assessment list opposite the tax.'"

The City Treasurer served notice upon plaintiff, that he would only sell the land as provided by the Act of 1895. The plaintiff, the contractor, owning one of said bonds, took out a mandate compelling the City Treasurer to sell as required by the Law of 1893, and recovered judgment. Upon appeal, it was claimed by the appellant, that the Act of 1895, amending the Political Code, governed the sale and that the provisions thereof, were "*ipso facto*, incorporated into the Act of February 27, 1893, and that the City Treasurer can proceed only in accordance with the provisions of the Political Code as it is amended."

The Supreme Court of California affirmed the lower Court and held that the sale should be conducted under the law as in force in 1893, pointing out the rule of statutory construction "that the adoption in

one statute, for the purpose of carrying its provisions into effect, of all the provisions of another statute by reference thereto, does not include subsequent modifications of these provisions in the statute referred to, unless a clear intent to do so is expressed"; as well as "the qualified exception" thereto, "in cases of the adoption into a special act of the provisions of law then in force by virtue of general laws"; adding, "In such case, subsequent modifications of the general law, will be deemed to be within the intent of such adoption, *so far as they are consistent with the purpose of the particular act * * *. A repeal of the adopted statute will not take from the adopting statute the operative force of this provision, so far as they may be necessary to carry the later statute into effect, but this provision will be regarded as if they had been originally incorporated therein at length*" (italics ours), citing cases and continuing,

"under the same principles, any amendment of these provisions of the statute thus adopted, whether it be of a particular act or a general law, which so far modifies them as to subvert the purpose of the statute by which they were adopted, will be regarded in the same light as a repeal. The main object of all statutory construction, is to ascertain the legislative will, and, as it is to be assumed that the legislature intends its act to have effective operation, *such amendments will not be considered depriving the adopting statute of all effect, unless there is a clear necessity for such construction*" (italics ours).

The Court then pointed out, that a comparison of the Act of 1893, with the Political Code, as amended in 1895, showed that the provisions of the latter, as amended, "are entirely inapplicable to the former and ineffective to carry its objects into effect," for the Act of 1893

"was to enable the contractors to receive the amount of the assessment as the several installments should mature, and to provide means for enforcing its collection in case of delinquency. The provision for a sale of the land at public auction to anyone who would pay the assessment, with the right in the contractor to become such purchaser, was an efficient mode of securing such payment; but if instead thereof, the land should be struck off to the State, with no power for its sale within five years, and no fund from which to pay the amount for which the sale was made, there would be no means by which the contractor could receive his payment, and the entire purpose of the act will be frustrated."

The Court then said:

"We hold, therefore, that the above amendments to the Political Code in 1895, are inapplicable to the provisions of the act of February 27, 1893, and that *the sale of land in delinquency in the payment of the bond is to be made according to the provisions of the law for the collection of and enforcement of taxes at the date of the act*" (italics ours).

The above decision, peculiarly in point, is a direct authority in support of our contention, that the sales under the Act of 1874, under which the certificates were issued, were to be made as provided for by the law then in force, that is, the Charter of Long Island City of 1871, Chap. 416.

In *Dodd v. Miller*, 14 Ind. 432, 433, the plaintiff had done work in draining swamp lands and was paid in certificates, issued by the commissioner of the swamp lands, payable out of the "Swamp Land Fund." The auditor refused to draw his warrants upon the treasury and plaintiff instituted proceedings by way of writ of mandate to compel him to issue the warrants. The defendant pleaded that

there was no money in the treasury belonging to the Swamp Land Fund. Another statute provided that the auditor who was the defendant should not draw warrants unless having moneys in the treasury belonging to the fund. The Court held in view of this last provision of the act the auditor could not be ordered to issue a warrant, but said at page 435:

"It is claimed that this enactment is inoperative and void, so far as it affects the certificates in question they having been issued before the passage of the statute. This statute does not, as we think, take away any vested right which the appellee had before its passage. He had a right to receive his money out of the appropriate fund whenever it should be in the treasury and this right is not in any manner impaired by the act in question. Admitting that under Section 35 of the Swamp Land Act the auditor might have been required to issue the warrant, although there was no money in the treasury belonging to the appropriate fund to redeem it, still the holder of the warrant could obtain his money no sooner than it came into the treasury. The right to the money is unimpaired and no delay in the payment is created" (italics ours).

In *McCracken v. Hayward*, 2 How. (U. S.) 607, 613, it was held that a sale of property in a way unauthorized was an unconstitutional violation of plaintiff's right, the Court saying:

"If the defendant had made such an agreement as to authorize a sale of his property which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs, or im-

pairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case, as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff" (italics ours).

In *Meyer v. Brown*, 65 Cal. 583, 589, the Court said:

"It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other." Cited with approval in *Kennedy v. Sacramento*, 19 Fed. 580, 584.

What the statute of 1874 could not have accomplished expressly it will not be construed to accomplish surreptitiously by implication contrary to the express requirements contained in it. The proper construction, therefore, of the provisions in Section 5 of the Act of 1874, regarding assessment sales is that they were to be made in accordance with the tax law as it existed at that time, which under Section 23, Chapter 416, Laws 1871 (Charter of Long Island City) "shall be made for the shortest period

for which any person will take the premises *and* pay the tax or assessment, interest, percentage, and expenses"; the "costs, fee, charges and expenses" (Laws 1874) alone were to be subject to change and "as shall then be prescribed by law." As shown by the Exhibits R, U, W, Z (Tr. Rec. pp. 107, *et seq.*), this was practically the unvarying practice prior to 1886. Any other construction would impute to the Legislature intent to work a fraud upon the contemplated Improvement Certificate holders and such construction will be avoided if possible.

(A) THE ACT OF 1886, CHAPTER 656, IS SUSCEPTIBLE OF A CONSTRUCTION CONSISTENT WITH THE CLEAR REQUIREMENTS OF THE ACT OF 1874.

As before stated, the treasurer of Long Island City attempted to justify his sales of lands for less than the assessments under the provisions of this Act of 1886. This Act by Section 4 authorized the sale of lands for unpaid taxes or assessments "at auction for the lowest term of years for which any purchaser will take the same and *pay the aggregate amount due thereon* and if no person shall so offer to purchase such property for a term of years, said treasurer or his representative shall sell such parcel in fee simple to the highest bidder"—"said treasurer shall bid in in the name of the City and for the use of the proper fund or account all parcels of real estate at such sale and to be sold for unpaid taxes, assessments, water rates and rents which shall not be sold to any other person" and by Section 16 all inconsistent Acts were repealed.

Now, whatever might be the proper construction of this act in relation to other matters and other acts, it seems as if the very clearly proper con-

struction of the Act of 1886 in relation to these assessments, under the Act of 1874, herein, was that it permitted sales in fee discharged of liens to highest bidders *only* where the minimum bid was not less than the assessment and interest as required by the Act of 1874, and that where the bid was less, the City should in pursuance of its trust obligation under the Act of 1874 bid in the land and hold it for subsequent sale in turn authorized by Section 9 of the said Act of 1886. This construction the testimony shows (Tr. Rec. 39, 40, and 80, 81) the certificate holders placed upon the act, and such would have been an honest construction of the Act of 1886, consistent with the rights and obligations created by the Act of 1874.

POINT 5.

Defendant's contentions and authorities cited.

(a) Defendant took the position that the Receiver of Taxes had the unqualified right under the Act of 1874 irrespective of the Act of 1886, to sell the lands for any amount irrespective of the assessment, basing their proposition on an argument *ab inconvenienti*. They claimed that under our contention if the property had fallen in value it would have been necessary for the Receiver of Taxes to have held the lands indefinitely; and that in any event the change, if any, was one of remedy and not of substance.

But this argument of our opponents is purely academic for as a matter of fact, the lands did not fall in value but actually greatly increased, as shown from

the testimony of Mr. Kearney (Tr. Rec. p. 87); but the Receiver of Taxes sold the lands irrespective of whether there has been any fall in value or not, as is apparent from the fact that the sales were made from 5 per cent to 50 per cent of the assessed value (Tr. Rec. p. 80)—our opponents we believe will not claim that the lands fell in value at all much less fell 5 per cent to 50 per cent of their value. Therefore the Receiver of Taxes sold the lands, irrespective of the actual value thereof; basing his right upon the Act of 1886 and totally disregarding the Charter of Long Island City, Charter provisions of 1871 in force at the time the certificates were issued which required tax sales to be for the full amount of the tax.

But if our opponents plead hardship then we point to what the Federal Court said in *Hicks v. Cleveland*, 106 Fed. 459, 463:

"Counsel eloquently depict the hardship upon the property holders if the township be compelled to pay money on bonds issued for a road which has never been begun. But does that justify the hardship to innocent bondholders, who paid their money upon representations of the promoters of the road and the provisions of the act of Assembly? Is it just? May we not go further and ask, is it honest to put the loss on them because the promoters of the road were remiss, negligent, perhaps dishonest?"

The point was made by our opponents, that as the assessment bore ten per cent interest and the certificates seven per cent, this was an indication that the Act of 1874 contemplated a sale for any amount the Receiver of Taxes might get. This three per cent difference might possibly be some basis for an argument that it was intended, as a practical measure, to cover a slight depression if any was to take place in

the value of the land. It certainly gives no foundation to the argument that under it the City Treasurer had the right to sell the lands for from 5 to 50 per cent of the assessed value when the only security the contractor, who did the work, and who used his money in the improvement for the betterment of the City or his financial backer had, was the maintenance of the integrity of the liens—which integrity was contemplated throughout the Act of 1874 by numerous provisions and which was also contemplated by the amendatory Act of 1879.

The provisions of the Act of 1874 (Sec. 5), that the sale for nonpayment of assessments should be made as tax sales were conducted, was not thus put in without a purpose. The purpose was obviously to give assurance to the contractor, who received pay in certificates, that he was to be protected. We are not ready to assume that this provision was a "joker" put into the act by an unscrupulous Legislature in holders. Our opponent's contention imputes just such order to defraud the contractor or other certificate a motive to the legislature.

No sane man would have invested a dollar in improvement work relying upon such a flimsy security as our opponents claim the Act of 1874 gave to the security holder—that is a lien which could be taken away at any time by legislative action.

(b) *People ex rel. Oakley v. Bleckwenn, and Nelson v. Bleckwenn.*

Our opponents relied on *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. 310, pointing out Judge Gray's statement that the certificates were "receivable at all times in discharge of assessment liens and upon sales in enforcement of such liens," and the statement "the question relates to the remedy, which the

legislature has provided for the enforcement of the payment of the assessment."

It should be borne in mind that this decision was made in 1891, after the Act of 1879 was passed, and was based upon the statute as thus amended; and was made before *any* sale had been made for *less than the amount of the assessment*, for the sales in 1888 were made for the full amount and the earliest sales that were made for less than the full amount were made in 1892. Therefore, the question as to a right to sell for less than the amount of assessment was *not involved or discussed because this question had never arisen*. Furthermore, the Act of 1879 then before the Court, *in terms* gave the right to use certificates in payment of the assessment; but did not do away with the Charter provisions of 1871, which provided that tax sales should be for the full amount, *i. e.*, the law in force when the certificates in suit were issued, and in force in Long Island City until the Act of 1886 was passed.

We have above shown, that the *Oakley* case had nothing to do with the question involved on this appeal, for it did not hold or attempt to hold and could not have held (no sale before the time of said decision having been made for less than the amount of the assessment) that the City Treasurer had the right to sell for less than the amount of the assessment. Our deponent also relied on *Nelson v. Bleckwenn*, 137 N. Y. 565. We have accordingly taken the trouble of thoroughly examining the opinions in that case, so that this Court may see not only the *total lack of authority* on which the decisions of the General Term and Court of Appeals were based, but the lack of reasoning and of logic therein; for we believe that a Federal Court sitting in equity where a clear case for the interposition of its aid, injustice and inequity

having been perpetrated, not only is not bound by the decisions, even of the highest Court of the State (Federal Constitutional questions being involved), but will not follow in any such case the State decision (pp. 15, 167).

In the *Nelson* case Judge Edgar M. Cullen, then a Justice of the Supreme Court, but later for many years the distinguished Chief Judge of the Court of Appeals, wrote two opinions. His first opinion was as follows:

"Cullen, J.:

"By the Act of 1874, it was provided that the assessments might be paid off and discharged by the improvement certificates. The security which the holder of any certificates might have was subject to this condition for it was so provided in the statute which created the contract. By a statute in 1879 it was further provided that at sales made for the assessments the certificates might be used at par and accrued interest. In *People v. Bleckwenn*, 126 N. Y. 310, it was held that the owner might use the certificates to redeem his land from the sale. By the original act the certificate holder instead of being entitled to his aliquot share of the proceeds of the whole assessment assumed the risk that the owners of the assessed lands which were valuable might pay off the assessments in certificates, leaving the outstanding certificates, the security of the assessment on lands of small value. *As long as the sale should be made for the assessment, the use of certificates either to buy at the sale or redeem from the sale no wise increased this hazard.* Nor when the fee is sold would the hazard be increased, if the sale is for no less than the amount due on the assessment, but to allow on a sale of the fee for a less amount, the bid to be paid in certificates, or a sale to be so redeemed plainly violates the

contract by impairing the security. It is like permitting on a sale of railroad under foreclosure, the purchaser to pay in bonds at their face value when the proceeds of the sale is not sufficient to pay the bonds in full. Plainly no such privilege could be granted.

"The reservation in the original act that the sale should be made under laws that thereafter might be in force, related solely to the manner of sale, etc., *but gave no right to vary the security.* The treasurer is not bound to bid in for the city at the amount due on the assessment, nor is he limited upon a sale of the fee to bids for such amounts. But if he sells the fee for a less amount the payment and the redemption must be in money. Nor can the sale be made subject to all prior sales for unpaid taxes, etc. This again violates the contract by impairing the plaintiff's security. The sale should be had subject only to sales for taxes which are superior liens to the assessment in question.

"An order directing sale in this manner should be entered. Order to be settled on notice." (Italics ours.)

His second opinion was as follows:

"Cullen, J.:

"While I can see the inconveniences that may arise on a sale for cash instead of one for certificates, *still there is no answer to the proposition that if the sale is made for less than the amount of the assessment, a receipt of certificates in payment is a preference of some certificates over others, and therefore violates the contract under which the certificates were issued.*

"I do not think it proper for me on this application to determine what taxes or assessments are paramount to the lien of the assessment for which the sale is made, but plainly the lien of this assessment cannot be subordinated to others which are inferior to it. The sale

should be made simply subject to the lien of all paramount and superior taxes and assessments and sales for the same." (Italics ours.)

It will be noticed that Judge Cullen took substantially the exact stand that we now take for he said among other things:

"As long as the sale should be made for the assessment, the use of certificates either to buy at the sale or redeem from the sale nowise increased this hazard. Nor when the fee is sold would the hazard be increased, if the sale is for not less than the amount due on the assessment, but to allow on a sale of the fee for a less amount, the bid to be paid in certificates, or a sale to be so redeemed plainly violates the contract by impairing the security. It is like permitting on a sale of railroad under foreclosure, the purchaser to pay in bonds at their face value when the proceeds of the sale is not sufficient to pay the bonds in full. Plainly no such privilege could be granted."

He, therefore, agreed with our position that the provisions in Section 5 of the Act of 1874, provided how the sale was to be made, gave no right to injure the fund for he said:

"The reservation in the original act, that the sale should be made under laws that thereafter might be in force, related solely to the manner of sale, etc., but have no right to vary the security."

Judge Cullen therefore had no doubt that the redemption in certificates, where the sale had been for less than the amount of the assessment, was a most heinous offense of the agent of the City. And as Judge Cullen said, redemption was improperly allowed in certificates where the sale was for less than the amount assessed, without intimating that the right existed to sell for less than the amount of the as-

essment. It should be remembered that these certificates used in redemption at par were worth only a fraction of their face value.

We turn from the convincing opinions of Judge Cullen and set forth below the unconvincing opinion of the General Term, with its total dearth of authority:

"Barnard, P. J.:

"The Court of Appeals has decided that the certificates of indebtedness such as are described in the complaint can be used for the purpose of redeeming land sold for unpaid assessments and taxes; that the City officer who makes the sale is bound to receive the certificates upon tender of the requisite amount."

People ex rel. Oakley v. Bleckwenn, 126 N. Y. 310.

"There is nothing in the law which limits the applicability of such certificate to cases where the assessment is larger than the bid. The sale is legal; the certificates can be used to pay for the bids made and the law does not require the bid to be for the full amount of the tax and interest. The certificates are to be received 'in payment of the assessment and accrued interest'; but the law, however, directs the sale to be made 'to the highest bidder.' There is no violation of the contract made with the other certificate holders. If the lot had realized a surplus that would have made a fund for all others; but when there is no surplus, the certificate is available to the bidder as well where the amount is insufficient to pay the whole tax and interest as in cases where it is sufficient."

According to this reasoning, the contractor, who had expended thousands in improvement work, was forced by this subsequent statute, to take the chance of loss.

We submit that this argument appeals with little force to the sense of justice or reason existing in the average mind, and it did not appeal to the Circuit Court of Appeals in the present case (Tr. Rec. p. 147).

The only case the General Term cited was *People v. Bleckwenn*, 126 N. Y. 310 (which we have referred to herein as the *Oakley* case) and which was not an authority, in any sense of the term, in support of the questions now before the Court, for as we have pointed out above and as Judge Cullen pointed out in his first opinion, the only question before the Court of Appeals in *People v. Bleckwenn* (*Oakley* case) was the right of the owner to use certificates in redemption, not as to a sale for less than the assessment or redemption in duplicates where a sale had been so made—as to that time, no sale had been made for less than the assessment so neither of these questions could have arisen.

We now call attention to the fact that the Court of Appeals in the *Nelson* case (137 N. Y. 565) wrote as follows:

"Agree to affirm on authority of *People ex rel. Oakley v. Bleckwenn* (126 N. Y. 310), no opinion.

"All concur, except Andrews, Ch. J., and Maynard, J., not voting.

"Judgment affirmed."

We respectfully submit that this Court not being bound to follow this decision of the Court of Appeals (see pp. 15, 167) should follow the only well-reasoned opinion handed down on the point involved, which was that of the Hon. Edgar M. Cullen.

The language used by one of the counsel in his brief in the *Nelson* case, before the Court of Appeals, was prophetic, for he said:

"It is obvious that by this method of sale two-thirds of such certificates will be outstanding and worthless when all the land shall have been sold, and all of the sales redeemed. One-third of the certificates will be paid in on the bids. The bidders having got their certificates of sale, another third of the certificates will be paid in to redeem, and these certificates must be paid by the defendant to the holders of the certificates of sale; so that in the end two-thirds of the certificates must be outstanding and worthless."

Complainant's proof (Tr. Rec., p. 76), shows that this is exactly what transpired; for with all the assessments cancelled there remained \$300,000 (par) of certificates—worth, if one were lucky enough to get a purchaser therefor, a few cents on the dollar; but with little likelihood of finding anyone to purchase them at any price, for their use was gone, their security was destroyed and the only interest attaching to them was as a relic of a scheme of high municipal financing, which we trust will never be duplicated.

The same counsel before the Court of Appeals, in commenting upon *People v. Bleckwenn* (*Oakley* case), said as did Judge Cullen substantially in his first opinion, *supra*, that the *People-Bleckwenn* decision, "has nothing to do with the questions discussed in this case."

We cannot refrain from calling to this Court's attention the attitude taken by the attorney for Bleckwenn before the Court of Appeals in the *Nelson* case, showing the frivolousness of his contentions, which we submit renders the reason for the decision of the Court totally beyond comprehension. The position taken in his brief was so preposterous, full as the brief was with admissions of counsel's own doubt as to the legality of the scheme of the Act of 1886, and basing

his reasoning entirely upon the ground that the Act of 1874 gave notice to the unfortunate contractor, who did the work, that the Legislature reserved to itself the power to totally annul the security of the assessments, which assessments said counsel himself admitted were the only security the certificate holders had. The sum and substance of his contention was that by force of the Section 5, Chap. 326, Laws of 1874, providing for the assessment sale by the Receiver of Taxes or officer charged with the duty of selling lands in the City for non-payment of city taxes, "the proceedings for such sale, and such sale shall be the same and on the same notice and like terms," meant that the Legislature reserved the power so to modify the law that it could provide for a sale *for any amount or way it saw fit.* This was just what Judge Cullen said the Legislature could not do and we submit that this attempt to do so, by the Act of 1886, was violative of the Federal Constitution, and furthermore that if the Legislature had intended such meaning in such section it should have made it clear in terms and not left the same as the counsel for Long Island City practically concedes it was, "*a trap for the unwary.*" In his brief, before the Court of Appeals, he said "is it not fair to assume that persons dealing in these securities informed themselves of their security before risking their money?" But the plaintiff was not "dealing" in these certificates. He was a member of the firm who financed the contractor, who, under the statute, *had to take his pay in certificates.* Counsel continued:

"but what was the plaintiff's 'contract' which he assumes to be impaired by the Act of 1886? He seems to be the owner and holder of certificates of indebtedness issued to pay for certain improvements in Long Island City. These

certificates were finally to be redeemed from a fund created by the collection of assessments upon property supposed to be benefited by the improvements"; continuing, "the proceedings for the sale of the lands were not necessarily to be the same as were prescribed by law at the time the assessments were levied and the certificates issued, * * *"; the plaintiff "assumed the risk of the very legislation of which he now complains. We take the broad ground that under this provision any act merely prescribing the procedure for the sale of the lands in Long Island City for the collection of taxes, the redemption of lands after sale and the perfecting of title on failure to redeem would be valid, *no matter how hurtful it might be to the security of the certificate holder*, provided the sale was open to all desiring to bid. *The certificate holder had no right to assume that the imperfect and inefficient machinery provided by the charter of Long Island City for the collection of taxes would remain unchanged.*"

We reply that if such machinery were imperfect and inefficient the contractor and the certificate holder had the right, if they thought it sufficiently protected them, to contract on the faith thereof.

The assumption that the acts of the City Treasurer destroying the lien, was a mere matter of "procedure" merits no comment.

There was absolutely no foundation for counsel's statement that:

"It would rather appear from the wording of the section that a change was anticipated. The plaintiff accepted these certificates with this legislative declaration that he could only bring to his aid in foreclosing his lien such machinery as might be available, when, by lapse of time, the security became liable to sale."

But counsel went on the other tack, saying:

"the Act of 1874, under which the certificates were issued undoubtedly contemplated the payment of the assessments in full."

He further stated:

"If the security accepted by the plaintiff in any of his investments is insufficient, he is liable to suffer loss, and when he gambles in securities of the character of these before the Court, he accepts the risk of loss with the chances of unusual gain."

But why should the plaintiff, in the present case, the financial backer of the contractor, be held to have gambled in securities and to have taken a risk of loss. He had no chance for unusual gain. The only chance he had was to get back the money he advanced to finance the work of the contractor, who was only to receive his contract price in certificates properly secured if the statute of 1874 was complied with, and satisfactory to him, but which through a non-compliance with this Act developed into a faulty medium of payment.

But even counsel for Long Island City, stated,

"that the only security possessed by the certificate holder is in the assessments," conceding that, "the whole scheme of improvement contemplated by the Act of 1874, and the *extraordinary provisions of the Act of 1886, present unusual difficulties in reaching a conclusion where equal justice shall be done the certificate holder and the land owner,*" and adding, "the scheme" of the improvement "was to make the certificates the currency to pay for the improvement and the assessment the means to retire the certificates, and to make them self-retiring. * * * *The scheme may have been of doubtful legality, but so far as it has been completed by voluntary payments, it is past recall.*"

But this argument proves too much.

(c) *Laches*. The lower Courts decided against the complainant solely on the ground of laches or the statute of limitations.

We especially call to the Court's attention the fact that the first sale of which we complain began on March 15th, 1892 (Tr. Rec., p. 74). The summons in the *Nelson* case was dated March 17th, 1892, two days after the sales began.

The case was decided by the Court of Appeals, February 10th, 1893. The interlocutory judgment appealed from was entered upon an order of the General Term, made December 12th, 1892. The interlocutory judgment or order of special term was made November 18, 1892, so far as we can gather from the record, shortly after the improper sales of 1892 had started, but before the far-reaching effects on the certificate holders could be ascertained but existed only in the prophetic vision of counsel. Since then his prophecy has been fulfilled to the letter.

The Circuit Court of Appeals felt it was not bound by these decisions of the New York Courts (Tr. Rec., p. 147).

The District Court took a similar position. At page 127 (Tr. Rec.), Judge Hand referred to the two decisions of the Court of Appeals of New York, in *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. 310, and *Nelson v. Bleckwenn*, 137 N. Y. 556. He correctly pointed out that in the *Oakley* case the question involved was whether the owner of a lot of land, sold for nonpayment of assessment under the Act of 1874, could compel the City Treasurer to accept the improvement certificates in redemption. Under the facts *then* before the Court, the decision is apart from the question subsequently raised when the sales were

made for less than the assessments and redemption improperly allowed in certificates at par for amount of bid.

He also correctly stated the decision of the Court of Appeals in the *Nelson* case, which affirmed the General Term (without opinion) "on authority of *Nelson v. Bleckwenn*," *supra*.

The decision in the *Oakley* case was therefore no foundation whatsoever for the decision in the *Nelson* case, because as a matter of fact what was said by the Court of Appeals in the *Oakley* case, in regard to the intentions of the framers of the Act of 1886 is conclusively in support of our contention that the act should have been, and as a matter of fact was, in furtherance, but not in derogation of, the right of certificate holders, and should have been so construed; for Judge Gray in the *Oakley* case said in speaking of the Act of 1886, at page 316:

"It was passed in relation to the general city taxes; but being the law in force for that purpose, at the time when the sales under this special law of 1874 were to be made, its provisions were controlling upon the *procedure* to be adopted therefor, and equally so upon the manner in which the privilege of redemption was extended and might be availed of by the property owner. *But it had no other force nor was of other pertinence than as an act of procedure.* * * * The caption of the Act of 1886 states that it is 'in relation to unpaid taxes, etc., and to collect the same in the future.' Such language indicated, or intimates, just what must have been considered by the legislature, and what we should hold to be the effect of the assessment sale; *that the sale is*

merely a mode of enforcement of the payment of the assessment."

That is, so far as it affected the Act of 1874, it merely did so as to the "procedure," but gave no power in derogation of vested rights. If it did otherwise it was unconstitutional, for a destruction of a vested right is much more than a mere "act of procedure."

If the Act of 1886 was "merely a mode of enforcement of the payment of the assessment," *the only way in which the liens of the assessments could be made secure and paid was by a sale for the full amount thereof*, and by proper redemption.

The testimony shows that there are outstanding \$300,000 par value of the certificates (Tr. Rec., p. 44), with no means of redemption and no hope of being paid unless this Court rectifies the wrong and compels the defendant to make good the wrongs of its predecessor.

Judge Hand pointed out that, as a matter of statutory construction, including the Constitution of the State of New York (no Federal constitutional question was raised in either of the two cited cases), these two decisions "are conclusive upon me" and "the only question which could be open is whether the effect of those two statutes when taken together might not be to impair the obligation of the contract." He then pointed out that the effect of the two decisions was to give a "direct preference" to the certificate holders who used "their certificates at the sales of lands, or to sell them." He then indicated an alleged similarity between such certificate holders and bondholders who did not come into a reorganization agreement, where the bondholders who did were permitted to use the face of their bonds upon the purchase price, where the custom was to credit upon the bonds only that pro-

portion of the amount of the purchase price which the bonds presented by the reorganization committee bore to the total issue, adding, "I think there would be a *genuine* question of constitutionality of the Statutes of 1879 and 1886, which gave a part of the certificate holders such a priority over the rest." But he held erroneously, that this question was not "open for consideration" as the claim was barred.

Thus it is clear that the learned Judge himself felt that a serious constitutional question was raised, but he decided against the plaintiff on the ground that his rights barred either by the Statute of Limitations or laches (Tr. Rec., p. 129). We have discussed this point at length elsewhere (Point 1 and p. 34).

He continued, and made the following statement, in which we submit he was clearly in error; the breach by the Trustee of his duty to sell the lands for the full amount of the assessment, was the "final execution of these obligations," and when "the City sold the lots and accepted the certificates in payment," "it undertook, as it supposed, it successfully undertook, to wind up the whole proceeding and if some of the certificates remained unpaid, that was supposed to be one of the misfortunes inherent in the situation."

Judge Hand took the position that the breach by the Trustee (Long Island City), in selling the lands for less than the amount of the assessment, constituted a *repudiation* of the trust. We submit (these sales being made prior to any adjudication on the point, *supra*) that the City had no right to suppose it had successfully undertaken to wind up the whole trust, when it thus breached its trust duties. We respectfully submit that the learned Court was undoubtedly in error in assuming that the *only trust duty* the City had was in selling the lands in question. *That was only one of its trust duties.* A breach of this single trust duty was not a *repudiation* of other duties;

it was, however, a breach, and a serious one to the unfortunate certificate holders. As shown by the *Oakley* case, the redemption still remained, and as Judge Cullen said (p. 147, this brief), in the *Nelson* case, this redemption at par with greatly depreciated certificates of a sale made for less than the amount of assessment was a clear violation of the certificate holders' rights.

The principal sale plaintiff complained of was in 1892. The sale in 1888, he does not complain of for the testimony shows that at that sale all lands were sold for the full amount of the assessment, but the sale in 1892, made March 12th, and March 15th, was before the decision of the Special Term in the *Nelson* case, and this decision was the first (and only case) attempting to hold that a sale could be made for less than the amount of the assessment. The learned District Court was in error therefore, when it said that the City Treasurer had asserted this unlawful purpose "in the face of an attempted injunction from the Courts," if it referred either to the *Oakley* or the *Nelson* cases, *the former of which did not pass upon this question and the latter of which had not then been decided.*

The point upon which the learned District Court decided against the complainant, was that laches or the statute of limitations barred him. This discussed hereafter under Point 1.

Astoria Heights Land Co. v. The City of New York.

East River National Bank v. City of New York.

Our opponents cited before the lower Court, and laid great stress thereon in their brief, two cases, to wit: *Astoria Heights Land Co. v. City of New York*, 89 A. D. 512 (aff'd, 179 N. Y. 579), and *East River*

National Bank v. City of New York, 93 A. D. 242, and tried to distinguish, but unsuccessfully *Koelch v. City of New York*, 34 App. Div. 98.

The *Astoria Heights Land Co.* case involved two statutes. Certificates of indebtedness were issued in the first place under Chap. 514, Laws of 1899, entitled "An act to improve portions of Grand Avenue and Main Street, of Long Island City." The work was not completed by the Commission provided for. An action was begun to enjoin the defendant from collecting assessments upon plaintiff's property which were alleged to be illegal. Before the beginning of the action and in 1893, the contractor doing the work was notified to stop by the Commissioners under the Act of 1890, and Chap. 664, Laws 1893, entitled "An Act to create a general improvement commission and to provide for certain improvements of the highways, streets, avenues, boulevards and public places in Long Island City" was passed. The Commission provided for was to consist of the Commissioner of Public Works and two aldermen of Long Island City and two freeholders to be appointed by the Mayor.

Our opponents quoted from the opinion of Hon. Hamilton Odell (judgment, upon the decision of the referee, aff'd by the App. Div., 2nd Department, upon referee's opinion), where he said, page 517:

"I agree with the learned counsel to the corporation that no liability was imposed upon Long Island City by anything that was done under the act of 1890, or by any failure of the Grand Avenue commissioners to complete the improvements which the act authorized and which they undertook to make," etc.

The referee, however, held that the Act of 1893, was in the nature of a *general improvement act* and that (page 519) "for the acts of that commission this defendant is liable."

He denied the relief prayed for, which was to cancel the assessments, BECAUSE THE COURT HELD THE HOLDERS OF CERTIFICATES OF INDEBTEDNESS (like the plaintiff in the present case) WERE ENTITLED TO PROTECTION, saying page 523:

"Has the Court any power, in the absence of the certificate holders, to destroy the fund provided by the statute for the redemption of the certificates, and on the faith of which the certificates were negotiated and the means procured with which the work authorized by the statute was begun and prosecuted almost to completion?"

Here, therefore, is a decision squarely in point that the second commission being in the nature of a general improvement commission, the City became liable for its acts.

We take up now the *East River National Bank* case.

In the first place this action was brought (page 243) "to recover from the defendant, the City of New York, the amount of certain certificates of indebtedness" issued by the Commissioners under Chap. 410, Laws of 1878, as amended. This action was, therefore, brought upon the assumption that the City, through its predecessor, was *directly liable* on the certificates of indebtedness,—a position we concede was untenable and which we do not take. Furthermore, it will be noticed that Chap. 410, Laws of 1878, contemplated the establishment of a special improvement commission, and was not as Referee Odell pointed out in the *Astoria* case, in the nature of a general improvement commission; for this act provided that certain named persons were appointed commissioners "to widen and improve Flushing Avenue, from Van Alst Avenue to the easterly boundary of Long Island City," but to have only the limited powers speci-

fied and no duties except as to a portion of Flushing Avenue. The commissioners in the *East River* case were, therefore, in a class similar to that of the commissioners under the Act of 1890, in the *Astoria Heights Land Company* case.

But when we examine Chap. 326, Laws of 1874, under which the certificates now before this Court were issued, we find an entirely different situation; for Sec. 1 provided that "The powers, duties and terms of office of the commissioners of streets, road, avenues and parks in Long Island City" appointed under Chap. 765, Laws of 1871, entitled "An Act to provide for the laying out of streets, avenues, roads and parks in Long Island City," as amended by Chap. 859, Laws 1872, which amendatory act was "An Act to provide for the laying out of streets, avenues, roads and Parks in Long Island City," were extended to the improvement Commissioners under the Act of 1874.

The Act of 1874 was, therefore, not a special act; it did not appoint a special commission; what it did was to extend the powers, duties and terms of office of the Commissioner of Streets of Long Island City so as to make them apply to an additional district. The Commission under the Act of 1874 was, therefore, a *general improvement commission*, analogous to the position of the Commissioners under the General Act of 1893, discussed in the *Astoria* case, *supra*.

This is perfectly apparent for Chap. 765, Laws of 1871, above quoted in Sec. 1, itself provided that the jurisdiction of the commission applied throughout Long Island City—the commissioners were not even to be "proprietors of or interested in any land or tenements within the limits of the aforesaid Long Island City."

And Chap. 859 of the Laws of 1872, which amended this Act of 1871, did not limit the territorial jurisdiction of the commissioners.

Therefore, for the very reasons that Referee Odell had in mind, we come without the limits of his criticism of the special Act of 1890, but fall within his decision as to acts done under a general improvement act.

As to the *Koelgesch* case, criticised by our opponents (discussed at length, page 116 of this brief), it will be noticed that the warrants were issued by commissioners under an act in the nature of a general improvement act of Long Island City. This case is strongly opposed to defendants' contentions.

Cases in Federal Courts in California.

Respondent in his brief below relied strenuously upon *Liebman v. City and County of San Francisco*, 24 Fed. 705. Opposing counsel, however, did not submit to the lower Court any analysis of the decisions of the Federal Courts in California subsequent thereto.

We will submit to the Court the subsequent attitude of the Federal Court in California.

In the *Liebman case*, an action at law was brought against the City and County of San Francisco to recover a money judgment on "Montgomery Avenue Bonds" issued under an Act of the Legislature, which provided that the costs of opening Montgomery Avenue should be assessed upon the lands, the Statute under which the bonds were issued declaring that the City and County of San Francisco

"should not in any event whatever be liable for the payment of the bonds, or any part or otherwise becoming the owner of any bond thereof and that any person purchasing them, or bonds accepted the same upon that express stipulation and understanding."

The Circuit Court held the City and County of San Francisco not liable *at law*.

Later the case of *Shapter v. City and County of San Francisco*, 110 Fed. 615, came before the Circuit Court *in an action at law* to recover a money judgment on Dupont Street bonds against defendants, issued under a Statute which contained a provision that the completion of the work and acceptance by the owners

"shall operate as an absolute waiver of all claim in the future upon the City and County of San Francisco for any part of the debt created by the bonds authorized to be issued by this act and their successors in interest."

The complaint was demurred to on the ground that the defendants were not liable; that the action was barred by the Statute of Limitations and that there was a defect of parties in the complaint, inasmuch as the owners of the property were not joined as defendants. The Court followed the decision in the *Liebman* case, pointing out that Mr. Justice Field in that case had laid stress upon the fact that the statute there provided the City and County should not be liable in any event for the payment of the bonds and that the contention that it was essential to establish the validity of the bonds as a preliminary to the application for a mandamus to levy the special tax was not correct, because the assumption that the validity of the bonds issued by one party could be determined in an action against another in no way named in them nor liable for their payment was not the law.

In the *Shapter* case it was urged that the plaintiff contended in the *Liebman* case that the Statute contemplated State action, but that in the *Shapter* case, it contemplated municipal action; but the Court

pointed out that *Lent v. Tillson*, 72 Cal. 404, had held otherwise, because the act there in question was more of a private than a public act, as the street was a narrow one for local purposes, the widening of which, could interest little if at all the general public, that the advantage was practically entirely one for the individual owners, and furthermore as conclusive thereof that the property owners had a right to stop the improvements if they so desired.

It could therefore be said with much force in those cases that the improvements were purely a private proposition; but in the present case we have an improvement over territory 2 square miles (Tr. Rec. p. 87), lying not far from the end of the 59th Street Bridge, a vast territory of vast interest to all of Long Island City and its inhabitants generally.

However, the Dupont Street bonds covered by the *Shapter* case came before the Circuit Court of Appeals in *Mather v. City and County of San Francisco*, 115 Fed. 37, in an action at law to enforce the payment of the bonds, where the Court examined the *Liebman* case and other cases with care. It cited *Jordan v. Cass County*, 3 Dill. 185, in which case it was pointed out that it was not contended that the bonds were the proper debt or obligation of the county or that payment could be enforced against the property of the county or taxpayers at large, the Court saying in that case:

"it is clear that they impose no obligation on the county and equally clear that the real or ultimate liability is on the taxable property within the township. But how, and against whom, is that liability to be enforced and made available?"

It was then pointed out that the Court in the *Jordan* case had referred to the fact that the Legislature had

"provided the mode of raising the means for paying the bonds by the collection of taxes and that it had enjoined upon the County Court the duty of levying such taxes which duty the Court remarked might be enforced by mandamus,"

adding,

"it seems clear when the legislature directed the bonds to issue in the name of the county, that it meant to give the bonds additional legal value, * * *. There must have been a purpose in requiring the bonds to be issued in the name of the county."

As the Supreme Court said in the *Jordan* case, the fact that the bonds were issued in the name of the county was not meaningless. If, as there conceded by counsel, there was no liability on the county to pay the debt, but the mere use of its name put some obligation upon it; then we can say with still greater force that here where the certificates were issued by the Commissioners (the number of Commissioners to be increased and vacancies to be filled by the Mayor of Long Island City), which certificates under the statute were to be countersigned by the City Treasurer, and all of the machinery for the enforcement of payment and maintenance of the security of the liens lay in the hands of the City Treasurer; that these provisions were not put in the statute for nothing. They were clearly inserted for the purpose of connecting the improvement with Long Island City and making clear that it was a municipal improvement.

In the *Mather* case, the Court pointed out that in the *Jordan* case and other cases cited, suit was brought, not on the ground that the county was under obligation to pay the bonds or in any way liable for the debt they represented (page 41) "but upon the ground

that the bonds were in form the bonds of the county and a duty had been imposed upon the county with reference to the payment thereof" (but note, not itself to pay), adding,

"although the debt was in such case primarily the debt of the township, the county stood in such relation to the township and to the bonds as to require the exercise of its official authority in the matter of levying, assessing and collecting taxes wherewith to pay the bonds, * * *. The provision in the act of the legislature that the City and County of San Francisco shall not be liable for the debt created by the bonds does not absolve it from responsibility to provide the means for the payment of the bonds in the manner prescribed by the act. *The counties which were the defendants in the suits above mentioned were not liable in any way for the payment of the bonds or the debts thereby represented, yet they were under obligation to provide a fund for the payment.* The provision in the act exempting city and county of San Francisco from liability for the debt means only that the debt is not the debt of the city and county and is not enforceable against it as such, but it does not mean that the city and county have received the legislative authority to refrain from doing the very things which the act of the legislature commanded it to do. The legislature certainly did not intend that the bondholders should have no remedy on their bonds. As was said by Judge Dillon in *Jordan v. Cass County*, 'undoubtedly the legislature designed there should be a remedy upon these bonds.' " (Italics ours.)

Adding,

"the bonds in the present case are the bonds of the city and are payable out of a special fund to be provided by the city."

But the Court also held (p. 45), that it was not obligated to follow the decision of the State Court where the bonds were issued prior to said decision.

Thereafter, *an action in equity* was started upon the Dupont Street bonds which came before the Circuit Court of Appeals in *Eddy v. City and County of San Francisco*, 162 Fed. 441, "the purpose of which is to charge the appellee as a voluntary trustee of the appellant for the collection of the taxes provided for in the act authorizing the widening of Dupont Street." The Court discussed the contention of the appellant (there and here) that the suit was maintainable under *Warner v. New Orleans* and *New Orleans v. Warner* (pp. 102 *et seq.*, of this brief), but did not pass upon this point holding that the plaintiff was not entitled to relief on the ground of laches—recognizing, however, the propriety of such an action in equity.

But what were the facts which guided the Court in its determination that laches existed? On page 45 of the opinion it was pointed out that the appellee, the City and County, had as alleged in the bill endeavored to excuse this breach of duty upon the ground "that suits were brought in 1880 to enjoin a tax collector from selling property in said district for payment of taxes, assessed for the purpose of carrying out the scheme of the act," and then said "in brief, the bill presents a case where the alleged trustee had twenty-five years before the commencement of this suit ceased and refused to perform any of the acts required to be performed by it under the terms of the statute." * * * (Italics ours.) And the Court pointed out that the only evidence of any activity on the part of the plaintiff was that he had demanded payment of the bonds and interest coupons; and done nothing else.

Finally the Court pointed out, page 446, that equity will withhold relief from those who have delayed the proper assertion of their rights, saying as follows:

"It does not always depend upon mere lapse of time. It involves, also, the question of change of situation which occurring during neglectful repose may render relief inequitable,"

adding, that during the many years since the maturity of the bonds it was reasonable to assume that a large part of the land might have been conveyed or encumbered.

The relief prayed for in our case would not involve a resale of the property, for this Long Island City through its City Treasurer has already made; but it would involve merely the accountability of the defendant to the plaintiff for its wrongful breaches of trust duties.

POINT 6.

The Act of 1886, construed to permit assessment sales of lands in a manner inconsistent with the Act of 1874, was unconstitutional.

To construe the Statute of 1886 so as to authorize sales of lands assessed under the Act of 1874 for less than the assessments would result in an impairment of the contract rights of the certificate holders under the Act of 1874, thus making the Act of 1886 unconstitutional.

It is unnecessary to elaborate upon this point, but it is deemed appropriate to call to mind the case of *Von Hoffman v. City of Quincy*, 4 Wall. 535, holding that a statutory power of taxation conferred upon a municipal corporation to provide for the payment of municipal bonds could not be impaired, in which case the Court said in the course of its opinion, at page 554:

"It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. *The State and the corporation, in such cases, are equally bound.* The power given becomes a trust which the donors cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other way."

Citing

People v. Bell, 10 Cal. 570, and *Dominick v. Sayre*, 3 Sandf. 55.

The liberal and independent attitude of the Federal Courts is shown by the following cases:

In *Butz v. Muscatine*, 8 Wall. 575, 584, Mr. Justice Swayne delivering the opinion of the Court, said, as follows:

"Here the remedy is taken away, not by a subsequent repeal, but by subsequent judicial decision. The effect upon the contract is the same as if the provisions of the Code had been repealed. This Court construes all contracts brought before it for consideration, and in doing so, *its action is independent of that of the State Courts which may have exercised their judgment upon the same subject.* This

is one of the functions we are called upon to perform in this case. *The fact that one of the elements in the case is a statute of the State does not affect the legal result.*" (Italics ours.)

In *Douglass v. County of Pike*, 101 U. S. 677, 687, Waite, C. J., delivering the opinion of the Court, said, as follows:

"We always regret to find ourselves in conflict with Courts of the State in matters affecting local law, but *when necessary*, we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction." (Italics ours.)

In *Louisiana v. Pilsbury*, 105 U. S. 278, 300, the Court characterizing an attempt by the City of New Orleans to evade its obligations said "We shall not waste words upon the scheme thus developed to evade the *jus. obligations of the City.*"

POINT 7.

The Federal Courts have an independent jurisdiction in the administration of State laws; and it is their duty to exercise their own independent judgment as to the meaning and effect of said laws; especially where a State decision is based on rights already accrued.

The Circuit Court of Appeals agreed with this contention, saying however (Tr. Rec. p. 147), "Upon that question it may well be that this Court is concluded by the decision of the State Court."

The rule has been laid down by a line of decisions of the Supreme Court of the United States from an early date, that the jurisdiction of Federal Courts is independent in the administration of State laws, and that such Courts are in duty bound to exercise their independent judgment as to the meaning of said laws. Especially is this true where the rights of litigants accrued *prior* to any of said decisions. Doubly so is it true when the said decision has resulted in the deprivation of rights, and the only source of relief is the Federal Courts; but conclusively, where the said statute (as constructed by City officers) was a trap for the unwary, resulting in the violation of contractual rights and the practical destruction of the security afforded under a prior statute to one investing heavily in improvements of a public nature.

In one of the early cases, *Pease v. Peck*, 18 How. (U. S.) 595, 599, it was said:

"Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the Court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the State tribunal might not be impartial between their own citizens and foreigners."

In this case while the Supreme Court said "we entertain the highest respect for that learned Court" (Supreme Court of Michigan), "and in any question affecting the construction of their own laws, where we entertained any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision," it added, "our reports furnish many cases of exceptions" to the dicta of the decisions

that the United States Courts follow the decisions of the State Courts on the construction of their own laws.

In *Burgess v. Seligman*, 107 U. S. 20, where a statute of Missouri covering the liability of a stockholder in a corporation was construed, the Supreme Court of the United States refused to follow the decision of the Supreme Court of Missouri, saying at page 33:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction in the administration of the State laws, co-ordinate with, and not subordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference" (italics ours).

And added,

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued" (italics ours).

(This last paragraph quoted with approval in *Stanley County v. Coler*, 190 U. S. 437, 445.)

To be sure the Supreme Court did point out that upon the principle of comity, the Federal Courts, would, "without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State Courts," continuing (p. 34) :

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail."

From the above it will be seen that the Federal Courts will never, upon the principle of comity, sacrifice its own independent judgment or its own dignity, especially when the decision of the State Court "was not a well-considered decision," but on the contrary was based on an opinion of an intermediate appellate court, brief in length, ill-considered, unsupported by authority, and which decision was affirmed without opinion by the higher court upon an earlier decision of the latter court, where the questions, while upon the same statute, were not at all upon the same point.

In *Julian v. Central Trust Company*, 193 U. S. 93,

103, the Court pointed out that the decision of the State Court which the Supreme Court there refused to follow was rendered *after* the rights of the litigants had accrued.

See to same effect *German Alliance Ins. Co. v. Home Water Co.*, 226 U. S. 220, 227.

In *Mather v. City*, 115 Fed. 37, Gilbert, C. J., said, page 45:

"It is true that the federal courts follow the latest decisions of the highest courts of the state, on questions of the construction of the constitution or statutes of the state, and that after a state statute receives settled construction by a state court of last resort such construction becomes as much a part of the statute as the text itself. *Douglass v. Pike Co.*, 101 U. S. 687, 25 L. Ed. 968. But the federal courts are not bound to follow such a decision of a state court unless it was made prior to the time when rights were acquired under the instrument which is in controversy in the action, and they will decline to follow it if such subsequent decision of the state court is contrary to its own previous ruling or to the previous decisions of the Supreme Court of the United States" (italics ours).

In *Yick Wo v. Hopkins*, 118 U. S. 356, the Supreme Court, in referring to the fact that certain ordinances of San Francisco had been construed by the Courts of California said, page 366:

"That, however, does not preclude this Court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which,

for that purpose, we are required to ascertain and adjudge. We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question."

Thus it was said by Waite, C. J., in *Douglass v. County of Pike*, 101 U. S. 677, 687, as follows:

"We always regret to find ourselves in conflict with Courts of the State in matters affecting local law, but when necessary we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction."

The Circuit Court of Appeals agreed with this construction we adopt (Rec., p. 147).

A. A STATUTE, UPON THE FAITH OF WHICH SECURITIES ARE ISSUED, THE FEDERAL COURTS WILL NOT CONSTRUE INTO BEING A SNARE TO THE PUBLIC.

It is interesting to note that Federal Courts will not allow a statute upon the faith of which citizens invest money upon securities issued by cities to exist as a trap or snare or means of fraud. Thus in *Andes v. Ely*, 158 U. S. 312, it was said at page 321, speaking of the issuance of municipal securities:

"Such statutes are not of a criminal character and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality."

This statement was approved of by the Circuit Court of Appeals, 2nd Circuit.

D'Esterre v. City of N. Y., 104 Fed. 605, 608.

In *Milner v. Pensacola*, F. C. 9619 (2 Woods 632), it was said by Wood, C. J. (quoting from syllabus) :

"A construction of a law which would impute to the legislature a design to perpetrate an unconscionable and barefaced fraud ought to be avoided if it can be fairly and reasonably done."

Thus it was pointed out in the case of *Gelpcke v. City of Dubuque*, 1 Wall, 175, 206, that a Federal Court will not follow the decision of a State Court so as to sacrifice truth and justice, the Court saying:

"We shall never immolate truth, justice and the law because a State tribunal has erected the order and decreed the sacrifice."

POINT 8.

The Treasurer of Long Island City, in performing the duties enjoined upon him by Chapter 326 of the Laws of New York of 1874, and in failing to perform the duties enjoined upon him by said Act and in conducting the assessment sale, was acting as an officer and agent of Long Island City, which became liable for his acts of misconduct.

We will not repeat the analysis of the Act of 1874 (pp. 82 *et seq.*, of this brief).

Throughout the entire Act it will be seen that constant reference was made to Long Island City which was to perform this or that duty through its treasurer.

UNDER CHAP. 461 OF THE LAWS OF NEW YORK OF 1871 AND CHAP. 454 OF THE LAWS OF 1879, THE RECEIVER OF TAXES AND CITY TREASURER WAS AN OFFICER OF LONG ISLAND CITY ELECTED BY THE CITIZENS OF SAID CITY AND RECEIVING A SALARY OF \$2,000.00 PER YEAR PAYABLE BY GENERAL TAX.

The Charter of Long Island City of which this Court will take judicial notice, the same being found in Chap. 461 of the Laws of 1871, Title 5, Chap. 2, Sect. 1 and Title 6, Sec. 1, of New York State, makes it clear that the City Treasurer was an officer of Long Island City and was payable by funds raised through tax levies. The Statute of 1874 made no provision for his payment out of the assessments to be levied. Such being so, the doctrine of *respondeat superior* applies and Long Island City became liable for all of the acts of the Receiver of Taxes and City Treasurer.

In *Hurley v. City of Brooklyn*, 28 St. Rep. 142, 143, it was said:

"If the corporation appoints or elects them and can control them in the discharge of their duties; can continue or remove them; can hold them responsible for the manner in which they discharge their trust and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interests, they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies."

This rule was also laid down in *28 Cyc.*, p. 1275, as follows:

"And if the acts, relating to the administration of local or internal affairs, as distinguished from public, governmental, legislative, or judicial duties, are done by those having competent authority either by express action on the part of the municipal government *or by the nature of the duties and functions with which they are charged by their officers or employment*, to act upon the general subject-matter, the rule of *respondeat superior* applies."

In *Fox v. Philadelphia*, 208 Pa. 127, 132, where in defense to an action for damages that the negligence was the act of the statutory commission and not of an agent of the City, the Court said in affirming liability against the City:

"The man who ran it may have been employed by the building commission *but he was paid out of the Treasury of the City, * * **"

Therefore the City Treasurer was an official and agent of Long Island City.

(A) A CITY TREASURER AND RECEIVER OF TAXES IS PECULIARLY A CITY OFFICIAL AND AGENT OF THE CITY.

Although we do not feel it should be necessary, in view of the fact that the City Treasurer and Receiver of Taxes was a paid official of Long Island City, to cite many cases to show that, in performing the acts contemplated by the statute of 1874, which were, as above shown, peculiarly local acts for the benefit of Long Island City and its residents, the City Treasurer was acting simply as a local officer and agent of Long Island City, yet as the question has been raised, we take the liberty of going into the question at length.

In *Amy v. Galena*, 7 Fed. 163, a most interesting decision, one squarely in point, it was held that the duty of a municipality to take the proper steps to raise means to pay judgments, was a *continuing duty* not subject to the statutory limitations of the lien of such judgments, the Court saying, "The town and county collectors so far as they are charged with the duty of collecting City taxes must be deemed *pro tanto*, City Officers."

In *State v. Wilmington*, 3 Harr. 294, the provision of the State Constitution that a clergyman could not be capable of holding any "Civil office in this State" was construed. This provision it was held, had (p. 300) "reference to State Officer" and such being so, a clergyman was eligible to the office of City Treasurer. A clear holding that a City Treasurer is not a State Officer.

In *People v. McKinney*, 52 N. Y. 374, it was held that the collector of taxes of the Town of Flatbush (now a part of Brooklyn) was a Town Officer.

That a City Treasurer is a City Officer in regard to the collection of City taxes appears from a decision in *City of Fort Wayne v. Lehr*, 88 Ind. 62.

In *Silkman v. Milwaukee*, 31 Wis. 555, it was held that an action lay against the City for the refusal of the Treasurer to pay over to holders of certificates, money in the City Treasury for local improvement work.

(B) A CITY OFFICER ACTING IN THE MAKING AND COLLECTION OF ASSESSMENTS FOR LOCAL IMPROVEMENTS IS ACTING AS A MUNICIPAL OFFICER AND AGENT.

A decision squarely in point and well reasoned to the effect that the opening of streets in a city, the

assessment of damages and benefits resulting therefrom, *the collection of the sums assessed, etc., are strictly municipal functions* and that therefore, the officers of the city by whom those functions are performed discharge *municipal duties* as distinguished from *governmental duties*, by reason of which a city becomes liable for the improper acts of its City Treasurer is the case of *Durkee v. Kenosha*, 17 N. W. 677. In that case the Court said as follows:

"The laying out and opening of streets in a City, the assessment of damages and benefits resulting therefrom, and the collection of the sums so assessed as benefits, are strictly municipal functions and the officers of the City by whom those functions are performed thereby discharge municipal or corporate duties, as distinguished from public or governmental duties."

"In that case it was pointed out that whatever the rule might be where the act of the City Treasurer was in the collection of 'general taxes' levied for the support of the government under authority of the government, yet that there could be no doubt of the rule where he acted in the collection "*of a mere local assessment for a municipal improvement in which the general public has no direct concern,*" the Court saying that "The distinction between the two cases is obvious and substantial."

It naturally follows that the collection by the City Treasurer of moneys to pay for local improvements, is acting in a municipal capacity.

Our opponents in their criticism of the *Durkee* case admitted (brief in District Court) that "in collecting the assessments by which such a municipal debt was to be paid, the officer was acting as a municipal officer" (their language).

The rule is laid down in 28 Cyc., page 1090, in discussing the question under the title "Municipal Corporations" as to "authority of officers" in regard to local improvements, as follows:

"Authority to assess damages must be expressly conferred by legislative enactment and will not be implied from power to make improvements; but where authority to make assessments is conferred on municipal officials they act in their proceeding as the agents of the municipality * * *."

Why not also the collection of moneys by sale to pay such assessments?

In *Smith v. Hirsh*, 87 Ill. 74, it was held that Park Commissioners were "corporate authorities" for the purposes of making a special assessment.

In *Edwards v. Jasper County*, 90 N. W. 1006, it was said:

"While authority to levy such assessments is traceable to the taxing power they are, nevertheless, assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy and the municipality acts as an agent merely in collecting the tax."

The rule was laid down in *A. & E. Ency. of Law*, (2nd Ed.), Vol. 20, page 1196, as follows:

"It has been held that in the exercise of those powers and privileges conferred upon a municipal corporation for private, local or merely corporate purposes of benefit, the rules which cover the liability in court of individuals or private corporations are properly applicable. And the mere fact that a particular enterprise might incidentally benefit the public health does not render the work a public function so as to exempt the City from liability for per-

sonal injuries inflicted by employees engaged therein."

A most instructive case concerning the attempted dishonesty of municipalities, meriting no praise so far as Long Island City or defendant are concerned, appears from the decision of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, where the City in attempting to free itself from liability upon a contract made for work done in the regulating and grading of a street, refused payment to the contractor upon the ground that he had not complied with the statute of the State in regard to the wages to be paid employees, though admitting that he had fairly done his work. The Court commented on the unfair attitude of the City and squarely held that *an officer directing a local improvement is an agent of the City*, saying among other things, as follows (pp. 8, 10 and 15) :

"It must be admitted that the attitude of the City authorized in this respect presents a curious and anomalous situation which involves some startling results. If they are right in the position taken it must follow that the City must accept and receive the benefit of the improvements made by contractors to the extent of thousands or millions of dollars, and though conceding that the work is honestly done, precisely according to the specifications of the contract, yet it may refuse to pay if it is able to show that the contractor has not, in the execution of the contract paid to the workmen employed by him what is called the prevailing rate of wages. The City may accept the work and the citizens may enjoy the benefit of it and treat the contract price as something forfeited by the contractors for their benefit. * * *

"Nor is it entirely true that the statute is a mere direction by the sovereign authority to one of its own agencies to contract in certain cases in a certain way. It is all that no doubt

and very much more, since it affects personal and municipal rights in many directions that are of vastly more importance than the mere form of a contract to perform municipal work. It is true enough that a City is an agency of the State to discharge some of the functions of government, but these terms do not adequately describe its true relations to the State or the people.

"A municipal officer directing a local improvement is not the agent of the State. He is the agent of the City and the City alone is responsible for his neglect or misconduct."

* * *

"The contractor is a private individual engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property entitled to the same protection as any other property. *It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance.* * * *"

(Italics ours.)

If "directing a local improvement" is a *municipal* act, then taking steps to collect the money to pay it, is assuredly so.

In *Hamilton on Special Assessments*, Section 440, is the following:

"Although a charter makes the expense of improving streets and sidewalks chargeable to abutting property, and not against the city or ward, yet such work is public work, and the officers of the city act as public agents in letting the contract."

Thus it has even been held that tax assessors are the agents of the town even in collecting *taxes*; see *Inhabitants of Berlin v. Inhabitants of Bolton*, 10 Metc. 115, 116, and *Monson v. Chester*, 22 Pick. 385, 388

If any point could be made as to a *tax assessor* not being an officer of the municipality, such a point certainly cannot be raised as to the matter of *local assessments*, which, in their nature, pertain peculiarly to the locality. The City and its inhabitants alone are interested therein. No such objection as might be raised to the acts as a tax official *in collecting taxes* could possibly be raised against such official in collecting local assessments.

An interesting case is *Jones v. Town of Lake View*, 151 Ill. 663, which was an appeal from a judicial determination as to the propriety of local assessments. The assessments were upheld and the Court, in pointing out that the supervisor and assessor were corporate authorities, said at page 672, as follows:

"The title of the Act of 1874 is: 'An Act to amend Sections 6, 7 and 9 of an Act entitled An Act in regard to the completion of public parks and the management thereof, approved June 16, 1871, and to add two (2) sections thereto. * * *' The original Act, as we have seen, relates to the acquiring of lands for park purposes, and the method of its acquisition; Section 20 relates to identically the same thing, the acquisition of land for park purposes, through the same instrumentalities, adding only the right to improve the same as parts of the park. * * * The Act of 1874 was not independent legislation upon a matter not embraced within the prior statute. * * * It is also insisted that the proceedings are unwarranted, for the reasons: first, that the supervisor and assessor of the town are not corporate authorities, within the meaning of the Constitution, authorizing the legislature to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment; second, that if the act attempts to delegate such power without submitting the question to a vote of

the people, the act is void. In respect of the first, the question was before this Court in *Hundley v. Lincoln Park Com'rs*, 67 Ill. 559, and again in *The People ex rel. v. Gage, et al.* 83 id. 486. In the latter case it was said, 'This Court, in *Hundley v. The Commissioners of Lincoln Park*, 67 Ill. 559, substantially held, that the supervisor and assessor of a town were corporate authorities of the town.' And it was there held, that the special assessments for local improvements, being made by these officers, were made by the corporate authorities of the town in which the land was situated, within the meaning of the constitutional provision, Article 9, Section 9, *People v. Salomon*, 51 Ill. 37; *People ex rel. v. The Mayor*, 51 id. 18. In respect of the second contention, no new municipality is proposed to be created. By general law, applicable throughout the State to all towns, similarly situated, the power to make local improvements by special assessment is conferred upon the corporate authorities of the municipality. And its public officers, elected by the people, are, by law, constituted such corporate authorities. There is a broad distinction between this case and the case of *The People v. The Mayor, etc., supra*. There an attempt was made to force an indebtedness upon the city without the consent of the people, or of the municipal authorities, and the principle there announced can have no application here. The power of the legislature to extend, abridge or abrogate, by general law, the powers and functions of the instrumentalities of government which it has created, cannot be questioned. And the right to impose additional duties and confer additional powers upon the municipalities of the State, clearly exists."

In the case of *Quill v. Mayor*, 36 A. D. 481, the Court pointed out that the necessity of *urban* life frequently rendered performance of certain acts strictly *municipal* duties, thus it held that the installa-

tion of a water supply came within the duties of a municipal act. In this case the Court in holding that the City was liable for injuries received through the negligence of the driver of an ash cart belonging to the Street Cleaning Department, through Judge Cul len, said :

"The same is true of the furnishing of water to the residents. It was primarily a private enterprise. Originally the burden of obtaining water for potable and other purposes rested on the persons desiring to use it to the same extent as in the case of flour to make bread. In many places and in many cities to day it is furnished by private capital. But here powers conferred on them, for purposes essentially public—purposes pertaining to the administration of general laws made to enforce again the necessities of urban life and the impossibility of getting water unless by a general supply from distant sources has rendered it necessary for municipalities to enter upon the work of furnishing water to their residents. *It seems to us that all these duties are strictly municipal.*" (Italics ours.)

See also to same effect as regards installation of water supply, *McElvoy v. Mayor of New York*, 54 How. Pr. 245; *People v. Supervisors*, 3 How. Pr. 43.

In short the various duties of the city machinery in reference to streets, sewers, parks and water works are those of agents for whose improper acts the City is liable. This is true even when the statute imposes a duty apparently upon such departments directly and extends even to cases where the statutes appoint and name officials to do the work, the work being accomplished by the city. Thus in the *Quill* case the city was held liable under an Act which provided "that the Commissioner of Street Cleaning shall have power and authority and is hereby charged with the duty of cleaning the streets."

Also squarely in point are the following cases:

City of Fort Wayne v. Lehr, 88 Ind. 62.
People v. McKinney, 52 N. Y. 374.

While the cases have held, as above shown, that even the collection of *taxes* is a municipal duty, yet without it being necessary to go as far as that in the present case, it is perfectly apparent that the collection of *local assessments* is different from that of a tax, as one relates to matters of *special interest* to the City and the other relates to matters of more general interest.

(C) THE WORK CONTEMPLATED BY THE STATUTE IN QUESTION WAS A LOCAL WORK FOR THE BENEFIT PECULIARLY OF LONG ISLAND CITY AND ITS INHABITANTS.

It hardly seems necessary to cite cases to show that the work contemplated by the statute in question in payment of which certificates were issued, was a *local improvement act* for the benefit peculiarly of the residents of Long Island City.

See, however, on this point:

Sage v. City of Brooklyn, 98 N. Y. 189.
Matter of Roberts, 17 Hun 559, 561.
McCullough v. Mayor, 23 Wend. 457, 459.
City of Williamsport v. Commonwealth, 84 Pa. 487, 494.
Jones v. City of Camden, 23 S. E. 141.

In *Philadelphia v. Garignin*, 62 Fed. 617, it was said quoting from *A. & E. Ency. of Law*, Vol. 15, page 1141, title "Municipal Corporations":

"So far as municipal corporations exercise powers conferred on them, for purposes essentially public—purposes pertaining to the administration of general laws made to enforce

the general policy of the state—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action is given. In reference to such matters they should stand as does sovereignty whose agents they are subject to be sued only when the state by statute declares they may be. In so far, however, as they exercise powers not of this character voluntarily assumed—*powers intended for the private advantage and benefit of the locality and its inhabitants*—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage which an individual or private corporation exercising the same powers for purposes essentially private would be liable." (Italics ours.)

In *Dickinson v. Boston*, 188 Mass. 595, it was held that though the City was not liable for damages through failure to light its streets, yet that by so doing the City "derived an *incidental benefit* by the protection thus afforded of decreasing the probability of action against it." (Italics ours.) And the action was held maintainable.

In *Donohoe v. Kansas*, 38 S. W. 571, it was pointed out that building of a sewer system was for the private benefit of the City.

(D) THE OPENING OF NEW STREETS, ETC., IS PECULIARLY A MUNICIPAL DUTY.

It was held in *Barnes v. District of Columbia*, 91 U. S. 540, where Mr. Justice Hunt said:

"The authorities state and our own knowledge is to the effect that the care and superintendence of streets, alleys and highways, the regulation of grades, *the opening of new and*

the closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality for which the work is to be done." (Italics ours.)

The characterization in the cited case, by the United States Supreme Court, page 554, of the decision of the Court of Errors of New York, in *Mayor v. Bailey*, 2 Denio 433, upon this point is interesting:

"The struggle in the New York Courts was between the dictates of that evident justice and good sense which required that the City should indemnify a sufferer for the loss arising from the acts of those doing the work under its authority *and for its benefit*, and the technical rule which exempted it from liability for the acts of officers not under its control or appointed by it." (Italics ours.)

We do not dispute the rule that the Legislature might have designated persons disconnected from any municipal duty to conduct the sale, that is perform the trust duties, but the fact remains that it did not do so, but even if it had so acted we challenge the accuracy of the claim that the appointment by the State of any one to perform purely municipal duties, results in the appointee being other than a city agent, and its representative. Such a rule would afford too easy a method of evading municipal duties, relegating the individual to the undesirable situation of a claimant against the State. The status of the official depends upon the statute in question.

(E) THE OPENING OF NEW STREETS, ETC., BENEFITS THE CITY WHERE LOCATED.

This results in the nature of things from increased tax valuations, conveniences, etc., and it has been so held. See the following cases:

Mitchell v. Burlington, 71 U. S. 270 (squarely in point).

Barree v. City, 112 S. W. 724, 726.

City of Oneida v. King, 116 A. D. 335, 338.

(F) THE OPENING AND CARE OF STREETS IS A PURELY MINISTERIAL FUNCTION OF A CITY.

See:

Barree v. City (supra).

Cavanaugh v. Brooklyn, 38 Barb. 232, 237.

McCarthy v. Syracuse, 46 N. Y. 194, 196.

Sandsbury v. Ithaca, 94 N. Y. 27, 30.

(G) THE FACT THAT THE IMPROVEMENTS WERE ORDERED BY THE STATUTE IS IMMATERIAL, THE CITY TREASURER STILL CONTINUING TO ACT THEREUNDER AS A MUNICIPAL OFFICER.

The fact that the Act of 1874 directed the performance of the acts of the City Treasurer and that he conducted a sale did not render the acts any the less municipal acts—the City Treasurer still continued the agent of the City as much as before. As a matter of fact almost all of the duties of officials are indicated in the various statutes. It is apparent therefore that a mere specification by the Legislature of the duties to be performed does not alter the character of the acts or the person performing them. Thus, in *N. Y. & B. S. M. & L. C. v. City of Brooklyn*, 71 N. Y. 580, where the act in question was done by the officer of the City appointed by the State Legislature, it was held that the liability of the City was the same as the case of a private individual acting through an agent; and this, although the circumstances were such that no implied action on the part of the City could be inferred, it being said at page 584:

"Second. A municipal corporation is held liable for the acts of an agent it employs to do business for its own corporate or private benefit, the same as a private individual, and this, although the agent may be appointed by the Legislature, or under legislative authority, if it accepts and ratifies the appointment. (*Appleton v. Water Com'rs*, 2 Hill 433.)

"Third. When a ministerial duty is expressly imposed upon a municipal corporation by legislative enactment, in the performance of which the public are interested, it may be held liable, *although the circumstances are such that an implied acceptance of the particular provisions may not be inferred.*" (Italics ours.)

See, also, the following cases. *Sage v. City of Brooklyn*, 89 N. Y. 189, and *Coster v. Mayor of Albany*, 52 Barb. 276 (reversed on other grounds in 43 N. Y. 399), where the obligation for a local improvement was assumed by the City by direction of the Legislature.

Thus the various departments of the City machinery in reference to streets, sewers, parks and water-works are agents for whose wrongful acts the City is liable. *This is true even when the statute imposes the duty apparently upon such departments directly and extends even to cases where the State statutes appoint and name the officials or commissioners to do the work who are accepted by the City.* See *Quill v. Mayor*, *supra*, where the City was held liable under Section 704, Chapter 410 of the laws of 1882, which provided as follows:

"The commissioner of street cleaning shall have power and authority and is hereby charged with the duty of cleaning streets, etc." (Italics ours.)

Under the adjudicated tests differentiating between governmental and municipal functions, the duties of

the City Treasurer under the Act of 1874 and 1886, in collecting assessments for local improvements, were clearly municipal as they were a benefit to the City and its citizens.

In *Hart v. Bridgeport*, F. C. 6149 (13 Blatch. 289), Judge Shipman said :

"If the City derived 'special advantage' or the act was 'for the increased comfort of its citizens,' it was municipal."

Elliott on Municipal Corporations, Sec. 30, says :

"If such duties relate exclusively to the local conditions of a particular community, the office is strictly municipal."

In *O'Donnell v. City of Syracuse*, 184 N. Y. 1, 13, it was said : "It was a corporate obligation" as it had "relation to its special interests."

In *Eddy v. Village*, 35 A. D. 256, 259, it was said that a municipal liability for neglect arose from an act "from which it derives some benefit or advantage."

In *Tindley v. Salem*, 137 Mass. 172, the Court said :

"There are other cases where a city or town has undertaken to build and maintain particular works, as, for example, sewers, waterworks, and gas works, *in part for the general benefit, and in part for the benefit of such individuals as may be able to use them advantageously, and where the expense is defrayed in the first instance, either wholly or partly, by assessments upon the estates immediately benefited, or where a charge is made by way of toll or rent to those who avail themselves of the benefit of the works. In such cases the work is not undertaken purely as a matter of common public convenience and service, for the benefit of all alike, but the city or town acts as an agency to carry on an enterprise partly commercial in its character for the purpose of furnishing con-*

veniences and benefits to such as pay for them. The element of a consideration comes in; and in such cases it is usually held that a liability exists for an injury to an individual through negligence in building or maintaining the works. *Child v. Boston*, 4 Allen 41; *Oliver v. Worcester*, 102 Mass. 489, 500; *Emory v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216; *Murphy v. Lowell*, 124 Mass. 654." (Italics ours.)

At this point it should be noted that the work of opening up the streets in question was not done *entirely for the benefit of the local public*, but the City itself benefited thereby in divers ways, such as always occurs in the case of a street opening. In addition to this will be noticed that the Act of 1874, provided (Sec. 11), that excess assessments should be used in paying the taxes due to the City, clearly making it apparent that the City might derive a benefit therefrom.

Over \$1,000,000 par value of certificates were issued to contractors for improvement work. It is reasonable to assume that this represented at least the value of the work done. This increased the value of the taxable property at least \$1,000,000. For thirty years the City has profited by this through increased tax returns. It is safe to say that the City has benefited financially to the extent of 1% (approximate tax rate) on \$1,000,000 for thirty (30) years or at least \$300,000. And for all this it has never paid one cent. The improvements were a tremendous benefit to its citizens (Tr. Rec. pp. 87, *et seq.*).

(H) THE ACTS ENJOINED UPON THE CITY TREASURER AND RECEIVER OF TAXES, RELATING AS THEY DID TO MATTERS OF PURELY LOCAL IMPORTANCE, THAT IS, THE COLLECTION OF LOCAL ASSESSMENTS, WERE NOT GOVERNMENTAL IN THEIR NATURE.

A restatement of the duties is unnecessary. Suffice it to say that they related peculiarly to local matters of *local interest and benefit*. The acts directed were clearly *municipal* in their nature.

The distinction between governmental and municipal powers and duties as well pointed out in *Hart v. Bridgeport*, F. C. 6149 (13 Blatch. 289), where Judge Shipman said among other things as follows:

"But where the power and duty are not governmental, and in special cases, where they are, but where the corporations derive some special pecuniary benefit or advantage from the exercise of the power, or have specially undertaken to perform the duty, in consideration of some special advantage, the rule is otherwise and they are liable, like other corporations for actual misfeasance. * * * Private or corporate powers are those which the City is authorized to execute for its own emolument and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit."

In *Elliott on Municipal Corporations*, Section 30, is the following:

"The question of the legislative control over the officers who manage the affairs of public corporations is determined by the distinction between the State and municipal officers. *This distinction rests not upon the name or the quality of the office, but upon the nature of the functions to be performed.* If the duties of the office concerns the State at large or the general public although exercised within definite territorial limits, it is a State office and under the absolute control of the legislature.

But if such duties relate exclusively to the local conditions of a particular municipality, the office is strictly municipal and any attempt on the part of the legislature to control the appointment of such officer is an interference with the right of local self-government." (Italics ours.)

Also, *Barree v. City*, 112 S. W. 724, 726.

Thus the Courts have held that the rule exists, that in the absence of evidence to the contrary it will be presumed that persons doing street improvement work are agents of the City; *City of Chicago v. Brophy*, 79 Ill. 277; *City of Chicago v. Johnson*, 53 Ill. 91.

In *Dillon on Municipal Corporations*, Section 97 (1911 Ed.), it is said:

"Questions have arisen under special constitutional provisions respecting the authority of the legislature over municipal offices and officers. And here it is important to bear in mind the before-mentioned distinction between State officers—that is officers whose duties concern the State at large, of the general public, although exercised within defined territorial limits—and municipal officers, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of local gasworks, or waterworks, the construction of local sewers, and the like, are matters which ordinarily pertain to the municipality as distinguished from the State at large." (Italics ours.)

In *Ehriggott v. Mayor*, 96 N. Y. 264, 272, it was said:

"The exclusive control here given to the Park Commissioners is not exclusive of the

City, but exclusive of any other officers of the City. It is the duty of the City to keep its streets in repair, and that duty as to all the streets in the annexed territory is devolved upon the Park Commissioners. It is a duty which they discharge, not for themselves, not for the public generally, but for the City. The duty is not taken away from the City. It is still bound to discharge the duty, and the Park Commissioners are the agency through which it discharges it. *The City must act through officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them.* It matters not how ample or exclusive their powers may be, nor how independently they may act, nor how they are chosen. If they are provided at law, and authorized to discharge a corporate duty which rests upon the municipality, then in the discharge of that duty they represent the municipality, and it may be chargeable with their misfeasance and nonfeasance. The exclusive control of the streets might by law be confided to the Mayor or to the Street Commissioner, free from the control of the Common Council, and yet the care of the streets would remain a municipal duty discharged by the officer designated for and on behalf of the City." (Italics ours.)

In *O'Donnell v. City of Syracuse*, 184 N. Y. 1, 10 and 13, it was said:

"In other words, if the duty be judicial in its nature as calling for the exercise of judgment, no liability rests upon the municipality for nonperformance; whereas if it be of a ministerial nature neglect to perform it will render the municipality responsible to the one injured thereby. * * * As to the sewers the situation was different. Their construction, so far as it had been assumed, devolved a duty upon the municipality for their maintenance in a proper manner and free from ob-

struction which was of a purely ministerial nature; *for it was a corporate obligation having relation to its special interests.*" (Italics ours.)

The opinion in *Eddy v. Village*, 35 A. D. 256, 259, is interesting:

"Now the basis of an implied municipal liability for negligence is either an obligation which rests upon the municipality in respect of its special or local interest, or else it is one under which it voluntarily assumes an undertaking from which it derives some benefit or advantage or for which it expects to receive a consideration."

Miscellaneous Cases.

(1) The following miscellaneous cases show how far the Courts have gone in putting liability on a City for acts of a local nature.

In *Prime v. City of Yonkers*, 116 A. D. 699, it was held that the City was liable for damages for constructing certain walls or abutments in connection with the opening of a public street which afterwards caused plaintiff damage.

In *Hathaway v. Osborne*, 55 Atl. 700, it was held that a town was liable for trespasses of its officers in laying out a highway.

In *People ex rel. Lovett v. Randall*, 151 N. Y. 437, 500, it was pointed out that a Commissioner of Highways was a town officer.

In *People v. Ingersoll*, 58 N. Y. 1, it was held that the raising of funds upon the credit of a political division of the State by means of taxation was not the act of governmental agency.

In *Elliott on Municipal Corporations*, Sec. 33, it was said, referring to Park Commissioners:

"Such Commissioners are primarily municipal officers exercising powers of a nature purely municipal."

In *Wilcox v. City of Rochester*, 114 A. D. 734, the Court held that a City could be liable for negligence in the performance of certain acts by an employee more of a governmental nature than the acts of the City Treasurer could possibly be said to be in the present case. In the case cited it was held that negligence in operating an elevator in a police station was not a governmental act.

In *Davoust v. City of Alameda*, 84 Pac. 760, it was held that a City in operating an electric light plant was not exercising governmental functions. See to same effect, *Fisher v. City of Newburgh*, 53 S. E. 343.

In *Wiltsie v. City of Red Wing*, 109 N. W. 114, it was held that a recovery could be had for damages from the breaking of a water reservoir constructed by the City under statutory authority, the furnishing of water being said to be "an undertaking of a private nature."

In *City of Richmond v. Lincoln*, 79 N. E. 445, an action was brought to recover damages for negligence. The defense was that the City in operating an electric light plant did so "in the discharge of a governmental duty." The Courts held otherwise, however. It was also urged that as control of the plant had been placed in the hands of Commissioners, under statutory authority, the City was not liable for their failure. It was held in spite of this fact that they were still representing the City and recovery was allowed. See also *City of Denver v. Davis*, 86 Pac. 1027.

It should be noticed that the entire line of cases in New York and elsewhere which may hold in various instances upon certificates issued in various

ways, that the City incurred no contractual obligation to pay the certificates, or liability for breach of duty on the part of the treasurer or other City official, supports our construction that an equitable right was created since no legal right enforceable at law was given; for otherwise no enforceable right in the certificate holders was contemplated which would be to construe the act of 1874 so as to make it a deliberate snare and fraud upon the public. For as said in *Andes v. Ely*, 158 U. S. 312, 321, speaking of the issuance of securities by a municipality under statutory authority, that such statutes not being criminal in their nature "are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in securities of the municipality"—likewise no statute should be so construed as to make it a "snare" upon the contractor who invests large sums of money in municipal improvements for the betterment of the City and the citizens thereof.

(I) A LOCAL ASSESSMENT AND THE COLLECTION THEREOF ARE PECULIARLY MATTERS OF LOCAL INTEREST, UTTERLY UNLIKE A TAX WHICH MAY BE GENERAL AS OPPOSED TO LOCAL.

The difference existing between a tax and an assessment and the method for the collection of the same is too clear to require any special comment. Though it may be true that a *tax* does not always specially concern a municipality, and that what is done by an official in the collection of the same may not *always* be said to have been done by a municipal officer, yet such is not the case as regards a local assessment which is from its terminology clearly a local matter. Thus in *A. & E. Ency. of Law* (2nd Ed.), Vol. 25, page 1168, it was pointed out that a

special assessment is not a tax being "materially different," citing many cases.

In *Galveston v. Guaranty Trust Co.*, 107 Fed. 325, 327, is a decision squarely in point, that an assessment is not a tax. See also *Sharp v. Spair*, 4 Hill 76, 77.

In 13 Cyc. page 1102, it was said:

"An assessment for a public improvement is not a tax in the ordinary sense of the term, but a charge for improvements * * *."

IF IT SHOULD BE THOUGHT, HOWEVER, THAT THE ACTS PROVIDED TO BE DONE BY THE CITY TREASURER AND COLLECTOR OF TAXES IN QUESTION WERE GOVERNMENTAL IN THEIR NATURE, STILL, THEY BEING ENJOINED UPON A CITY OFFICIAL AND HAVING BEEN PERFORMED IMPROPERLY, OR IN OTHER WORDS, THE CITY HAVING FAILED TO PERFORM THEM PROPERLY, THE CITY IS LIABLE, FOR A MUNICIPALITY IS LIABLE FOR ITS IMPROPER PERFORMANCE EVEN OF GOVERNMENTAL DUTIES.

That a municipality is liable for the improper performance of governmental duties appears clearly from the following cases and requires no extended citations:

Sammons v. City of Gloversville, 175 N. Y. 351.

Town of Southeast v. City of New York, 96 A. D. 598, 601.

In *Gibson v. Huntington*, 22 L. R. A. 561, it was also pointed out that a City is liable for improper performance of ministerial duties not discretionary or governmental "even though there be the absence of special rewards or advantages."

In *City of Anderson v. East*, 2 L. R. A. 712, it was said:

"Municipal corporations are liable for a negligent breach of a ministerial duty."

In *Town of Southeast v. City of New York*, 96 A. D. 598, 601, it was said:

"I do not think, however, that any case can be found in this State which absolves a municipal corporation from the duty of exercising ordinary care in the management of its property even where the property is devoted to a governmental purpose or which commits such corporation under the guise of governmental use to negligently invade and destroy the property of another." (Italics ours.)

(J) THE IMPROVEMENT WORK HAVING BEEN DONE BY THE CONTRACTORS, UNDER THE STATUTE IN QUESTION, FOR A PUBLIC PURPOSE AND LONG ISLAND CITY HAVING BEEN BENEFITED AND HAVING ACCEPTED THE BENEFIT, IT AND ITS SUCCESSOR BECAME ESTOPPED TO DENY THE ACTS OF ITS OWN OFFICER AND AGENT.

The City is estopped through its acceptance of benefits as well as by ratification.

(a) Estoppel: The City has accepted the benefits of the work done and is estopped thereby. The contractor and his assignees have been deprived of their right through wilful misconduct and technicalities as well as the unconstitutional interference of the Legislature. Justice has not been done. A city can no more be dishonest than an individual. Having accepted the benefits it must compensate the certificate holders for its neglect and breach of trust.

In *Edwards v. Jasper County*, 90 N. W. 1006, where

the City had raised the point that it was not liable for services rendered in local improvements it was said by the Court, referring to *People v. Coler*, 59 N. E. 716:

"There as here the work was completed and the City as well as the property owners had received the benefit thereof. * * * Having had the benefit of the work it does not lie in the mouth of the county or of the City to say that it will not pay therefor * * *"

Perhaps one of the most instructive cases is *Peake v. New Orleans*, 139 U. S. 342, where the question arose as to the liability of the City for failure to collect certain assessments (subsequently overruled in *Warner v. New Orleans*, *supra*). The majority of the Court held that the City was not liable but the reasons given at page 353 preclude the decision from acting as a precedent to bar the plaintiff's recovery in the present case, for the reason that it there appears that the City (p. 353)

"Had no choice of contractor or price. Neither the property to be taxed nor the means of collecting the assessments was intrusted to its discretion. This is not a case in which there was a failure on the part of the legislative body, the City Council, to prescribe and provide sufficient machinery for the collection of assessments. No superintendence of the financial department, whether as to the property to be assessed, the amount of the assessment or the collection thereof, was intrusted to the municipality. All this financial power was placed directly, by State action, without its consent, in one of its official boards." (Italics ours.)

In the dissenting opinion by Harlan, J., page 363, concurred in by Fuller, C. J., and Lamar, J., it was said, quoting from a Louisiana case as follows:

"The large proportion of the expense by which this burden is thrown upon the City for these streets, meets, in some measure, that equity which has been urged upon our consideration, that as the work has been undertaken for the public good, the public ought to bear the charge of it notwithstanding the benefit to the owner of the soil."

Judge Harlan continued as follows:

"Indeed what could be more just than that a local assessment directly beneficial to all, should in some form and to some extent, at least, be provided for by general contribution? Why should the cost of it be defrayed by one species of property alone?" (Italics ours.)

And in this case where the bill was filed for an accounting (p. 367) Judge Harlan said:

"These large assets, having come to the hands of the City for the purposes of a great public trust, it was bound to relieve itself of the charge assumed by it in some way consistent with the rule of reasonable diligence. In view of its antecedent agency and its co-operative action in the creation of a trust and its more than willing acceptance of it, *added to the fact that it was the party to be ultimately benefited*, we are not prepared to accept the theory that it was a compulsory and not voluntary or contractual trustee, a failure to discharge whose obligations put less strain upon the moral sense than if the obligation had been purely statutory. And in this connection, it is well to observe that this bill was filed for the purpose of an accounting. A trustee, City or not—it is immaterial—receives large assets, of which its own liability forms a considerable part; and the simple question is, how shall it relieve itself of the charge?" (Italics ours.)

The doctrine of estoppel of a municipality clearly appears from the following cases:

Rondot v. Rodgers Township, 99 Fed. 202, 213.

Bank v. Town of Walcott, 7 Fed. 892.

Bank v. Town of Seneca, 15 Fed. 783, 785.

Supervisors v. Schenck, 5 Wall. 772, 782.

This is true even though the City may receive the benefit of the act under a void contract for in such an implied obligation to reimburse arises; *Nelson v. Mayor*, 63 N. Y. 535, 544.

(K) WHETHER ACTS OF THE CITY TREASURER WERE GOVERNMENTAL OR NOT, IS NOT DECISIVE.

But as heretofore shown, it is not decisive of the question, whether the duties were governmental or not, for the reason that Long Island City received the benefit of the wrongful acts (breaches of trust) of its City Treasurer, irrespective of whether his violated duties were municipal or governmental, through enormously increased tax returns and otherwise which would result in its becoming a quasi trustee to the certificate holders for the certificates unpaid, at least to the extent of benefits received.

(L) THE RULE OF RATIFICATION OF UNAUTHORIZED ACTS BY AN AGENT APPLIES TO A MUNICIPALITY AS WELL AS TO AN INDIVIDUAL.

The City in the present case having accepted the benefit of the act of its officer, the City Treasurer and Collector of Taxes, and having recognized his act in allowing redemption and the use of assessment certificates has clearly ratified all of the acts of the official. The rule of law as to the liability of a

municipality appears from the following citations: 28 Cyc. 1279; *Pritchard v. Georgetown*, F. C. 11437 (2 Cr. C. C. 191); *Willoughby v. Allen*, 56 Atl. 1109; *City of Oklahoma v. Hill*, 50 Pac. 242.

The City is still ratifying the wrongful sale (breach of trust) and accepting the benefits thereof, for each year it receives additional returns on its tax levy due to the work of the contractors for which they have gone unpaid.

POINT 9.

An action for an accounting in equity and to establish a trust is a proper remedy to enforce liability against a municipality for failing to collect assessments.

This point was thoroughly discussed and decided in *Vickrey v. Sioux City*, 104 Fed. 164, 166, to which the attention of this Court is called elsewhere (pp. 99 *et seq.*).

POINT 10.

The City of New York succeeded to all of the obligations and duties, trust and otherwise, of any and every kind of Long Island City.

Chapter 466, Laws of 1901, of the State of New York, (the act incorporating Greater New York), in Section 4, provided as follows:

"All valid and lawful *charges and liabilities* now existing against any of the municipal or public corporations or parts thereof, which by this act are made part of the corporation of the City of New York, * * * which but for this act would be valid and lawful charges or liabilities against the same, shall be deemed and taken to be like charges against or liabilities of the said The City of New York, and shall accordingly be defrayed and answered unto by it to the same extent, and no further, than the said several constituent corporations would have been bound if this act had not been passed." (Italics ours.)

Koelgesch v. City of New York, 34 A. D. 98, 101, 102.

Bronx Gas Co. v. Mayor, 17 Misc. 433, 435.

Hendrickson v. City of New York, 160 N. Y. 144, 149.

D'Esterre v. City of New York, 104 Fed. 605, 611.

A. THAT A CITY ABSORBING ANOTHER TAKES THE LATTER, *CUM ONERE*, IS DECIDED IN:

Mt. Pleasant v. Beckwith, 100 U. S. 514, 528.

Milner v. Pensacola, F. C. 9619 (2 Woods 632),

and the remedy is in equity (*Mt. Pleasant v. Beckwith, supra*).

POINT 11.

Miscellaneous constitutional decisions relevant to the questions raised.

- a. THE OBLIGATION OF A CONTRACT IS THE LAW WHICH BINDS THE PARTIES TO PERFORM THEIR OBLIGATION.

The law of the contract was Chapter 326 of the Laws of 1874, and the provisions of the Charter of Long Island City, Chap. 461 (Title 6, Secs. 23 and 26) of 1871 directed the manner in which tax sales were to be conducted. These acts define the rights of the parties. That they became a part of the *obligation of the contract* is apparent from *Ogden v. Saunders*, 12 Wheat. 212, per Mr. Justice Washington.

In *National Bank v. Sebastian County*, F. C. 10040 (5 Dill. 414), it was said:

“What is the obligation of the contract? It consists in the power and efficacy of the law which applies to and imposes performance of the contract or the payment of an equivalent for nonperformance.”

See similarly:

Walker v. Whitehead, 16 Wall. 314, 318.
McCracken v. Hayward, 2 How. (U. S.) 607, 612.

In *Cook v. Gray*, 2 Houst. 455, it was said:

“The obligation of a contract did not spring alone from the terms of it, but from the terms and the law as it existed at the time of the making of the contract in regard to the subject-matter of it.”

b. THUS THE OBLIGATION OF A CONTRACT FREQUENTLY COVERS MUCH MORE THAN IS ACTUALLY SPECIFIED THEREIN.

To same effect, see:

- Jordan v. Wisner*, 45 Iowa 65, 67.
Aycock v. Martin, 37 Ga. 124.
Robinson v. Magee, 9 Cal. 81, 84.
Holland v. Dickeson, 41 Iowa 367, 370.
A. & E. Enc. of Law, (2nd ed.), Vol. 15, page 1032.
8 Cyc. 930.

c. THE ABOVE PROVISION APPLIES TO MUNICIPALITIES, ITS OFFICERS AND ITS OBLIGATION, AS WELL AS TO AN INDIVIDUAL AND HIS OBLIGATIONS.

- A. & E. Enc.* (2nd ed.), Vol. 20, 1222.
A. & E. Enc. (2nd ed.), Vol. 15, 1033.
8 Cyc. 951, 952.
Dodd v. Miller, 14 Ind. 433.
Dillingham v. Hook, 32 Kan. 185.
Maenhaut v. New Orleans, 16 F. C. 8939 (2 Woods 108).
Shinn v. Cunningham, 120 Iowa 383, 388.
Seeley v. Hall, 8 Colo. 485.
Atkins v. Randolph, 31 Vt. 226, 236.
Eidemiller v. Tacoma, 14 Wash. 376.
Williams Appeal, 72 Pa. 220.
O'Donnell v. Phila. 2 Brews. (Pa.) 482.
Milner v. Pensacola, F. C. 9619 (2 Woods 632).
Butz v. City, 8 Wall. 575.
Mt. Pleasant v. Beckwith, 100 U. S. 514, 526.
Amy v. City, 7 Fed. 163.
Brooklyn, etc. v. Armstrong, 45 N. Y. 234.
People ex rel. Reynolds v. Common Council, 140 N. Y. 300.

And the leading case of

Von Hoffman v. City of Quincy, 4 Wall. 535.

d. NEITHER CAN A MUNICIPALITY ACTING UNDER THE STATE, THROUGH DELEGATED POWER, IMPAIR SUCH OBLIGATION.

Mt. Pleasant v. Beckwith, 100 U. S. 514, 534.
Penn. Mutual, etc., Co. v. Austin, 168 U. S. 685, 694.

e. A STATE CANNOT REPEAL A LAW IN FORCE AFTER THE OBLIGATION OF THE MUNICIPALITY THEREUNDER ACCRUES.

Galena v. Amy, 5 Wall. 705.
Amy v. Galena, 7 Fed. 163, 167.
People ex rel. Reynolds v. Common Council, 140 N. Y. 300, 307.

f. VESTED RIGHTS ARE PROTECTED UNDER THE FEDERAL CONSTITUTIONAL PROVISION, AND NO COURT, STATE OR FEDERAL, CAN INTERFERE WITH THEM, WITHOUT VIOLATING THIS PROVISION.

Leonard v. City of Shreveport, 28 Fed. 257, 258.
State v. City of New Orleans, 32 La. Ann. 709, 714.
Franklin v. Bailey, 10 L. R. A. 405 (note), and the leading case of
Marbury v. Madison, 1 Cranch. 137, 163, per Chief Justice Marshall.

g. NOR CAN A LIEN BE DIVESTED BY FORCE OF A STATUTE.

Poindexter v. Greenhow, 114 U. S. 270, 300, 301.
Hartman v. Greenhow, 102 U. S. 672, 680.

- Trustees, etc. v. Beers*, 2 Black 448, 452.
Jordan v. Wisner, 45 Iowa 65, 67.
Yeatman v. King, 51 N. W. 721, 723.
Crowther v. Company, 85 Fed. 41, 43, 44.
Merchants Bank v. Ballou, 32 S. E. 481, 483.
Giles v. Stanton, 26 S. W. 615, 618.

Thus a state statute which takes from a mortgagee his right of possession is unconstitutional.

- Hooker v. Burr*, 194 U. S. 415, 420.
R. R. Co. v. Hamilton, 134 U. S. 296, 299.
Blackwood v. VanVleet, 11 Mich. 252.
Travellers Insurance Co. v. Brouse, 83 Ind. 62.
Boice v. Boice, 27 Minn. 371.

h. MOREOVER WHERE, UNDER A STATE STATUTE, A MUNICIPALITY IS PLEDGED TO A LEVY TO RAISE FUNDS FOR THE PAYMENT OF OBLIGATIONS, THE STATE HAS NO RIGHT TO AMEND OR REPEAL THE STATUTE SO AS TO DESTROY THIS SECURITY.

- Louisiana v. Pilsbury*, 105 U. S. 278.
Amy v. City of Galena, 7 Fed. 1.
U. S. v. County Court, 2 Fed. 1.
Butz v. City, 8 Wall. 575, 584.
Mobile v. Watson, 116 U. S. 289, 305.
Hicks v. Cleveland, 106 Fed. 459, 463.
Fazende v. Houston, 34 Fed. 95, 96, 97.
Morris v. State, 62 Tex. 728, 743.
Padgett v. Post, 106 Fed. 600, 603.

i. THE REPEAL OR AMENDMENT OF A STATUTE CANNOT AFFECT CONTRACT RIGHTS ACCRUED PRIOR THERETO.

- Amy v. Galena*, 7 Fed. 163.
State v. Hawthorn, 9 Mo. 389.
State v. Phaler, 3 Harr. (Del.) 441.

j. THE CONSTITUTIONAL PROHIBITION APPLIES TO EXECUTORY AS WELL AS EXECUTED OBLIGATIONS.

Biddle v. Green, 8 Wheat. 1, 90.

Fletcher v. Peck, 6 Cranch. 87, 135.

Farrington v. Tennessee, 95 U. S. 679, 683.

A. & E. Enc. of Law, vol. 15, page 1033.

k. AND THE DEGREE OF IMPAIRMENT IS IMMATERIAL.

Walker v. Whitehead, 16 Wall, 314, 318, per Mr. Justice Swayne.

"Any impairment of the obligation of a contract—the degree of impairment is immaterial is within the prohibition of the Constitution."

In *Planters Bank v. Sharp*, 6 How. (U. S.) 300, 326, the Court said:

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. *It is not by the constitution to be impaired at all.* This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force." (Italics ours.)

See similarly:

Edwards v. Kearzey, 96 U. S. 595.

Green v. Biddle, 8 Wheat. 1, 83.

McCracken v. Hayward, 2 How. (U. S.) 607, 613.

l. THE REMEDY CANNOT BE ALTERED IN VIEW OF THE CONSTITUTIONAL PROHIBITION, UNLESS EQUAL PROTECTION BE GIVEN BY THE AMENDMENT, AS SUCH REMEDY IS A PART OF THE CONTRACT.

THAT IS THE EFFICIENCY MUST NOT BE LESSENED.

In *Walker v. Whitehead*, 16 Wall. 314, 317, Mr. Justice Swayne said:

"Nothing is more material to the obligation of a contract than the means of its enforcement."

See similarly:

Edwards v. Kearzey, 96 U. S. 595, 600.
Bronson v. Kinzie, 1 How. U. S. 310, 316, 317.

Gunn v. Barry, 15 Wall. 610, 623.
Von Hoffman v. City of Quincy, 4 Wall. 535, 552.

Butz v. City of Muscatine, 8 Wall. 575, 584.
Louisiana v. New Orleans, 102 U. S. 203.

m. AND THE CONSTITUTIONAL PROHIBITION APPLIES TO THE IMPAIRMENT OF OBLIGATIONS IMPLIED AS WELL AS THOSE EXPRESSED.

Fisk v. Jefferson Police Jury, 116 U. S. 131.
Burton v. Town of Koshkonong, 4 Fed. 373, 376, 377.
Cary Library v. Bliss, 151 Mass. 364, 373.

n. ALTHOUGH A STATE STATUTE IN ITSELF DOES NOT CONSTITUTE A CONTRACT, YET WHEN A CONTRACT IS MADE THEREUNDER IT BECOMES A PART THEREOF.

Brooklyn, etc. v. Brooklyn, etc., 32 Barb. 358.
People v. Hall, 8 Colo. 485, 492.

a. UNDER THE PROVISIONS OF THE FEDERAL CONSTITUTION A STATE COURT CANNOT BY ITS DECISION IMPAIR THE OBLIGATION OF A CONTRACT.

Muhlker v. Harlem R. Co., 197 U. S. 544, 570.
Harmon v. Auditor, 123 Ill. 122, 135.

And the Federal Courts have held consistently that:

b. WHEN OBLIGATIONS HAVE ACCRUED ON THE FAITH OF THE EXERCISE OF THE TAXING POWER, THIS POWER CANNOT BE INTERFERED WITH.

In *Von Hoffmann v. City of Quincy*, 4 Wall. 535, 554, it was said:

"It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. *The State and the corporation, in such cases, are equally bound.* The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other way." Citing, *Dominic v. Sayre*, 3 Sandf. 555 (italics ours).

See similarly:

Fort Madison v. Fort Madison Water Co., 134 Fed. 214, 216;

Leonard v. City of Shreveport, 28 Fed. 257,

and no matter how harshly it may operate on the City.

Board of Education v. Board of Education, 76 A. D. 355 (aff'd 179 N. Y. 358).

Q. WHEN A MUNICIPALITY IS REQUIRED BY LAW TO LEVY A TAX TO PAY INTEREST ON ITS OBLIGATIONS IT HAS NO RIGHT TO DIVERT SUCH FUNDS WHEN COLLECTED AND EQUITY WILL INTERFERE.

Ranger v. New Orleans, F. C. 11564 (2 Woods 128);

Chaffraix v. Board of Liquidation, 11 Fed. 638;

Fazende v. City of Houston, 34 Fed. 95, 97;

Macphant v. New Orleans, F. C. 8939 (2 Woods 108).

and as a corollary to the above it follows that:

r. NO SUBSEQUENT ACT OF A LEGISLATURE CAN IMPAIR A FUND FOR THE PAYMENT OF A MUNICIPAL OBLIGATION, SO AS TO AFFECT VESTED RIGHTS.

This rule is clearly set forth in *Von Hoffman v. City of Quincy*, 4 Wall. 535.

It follows therefore that:

s. A STATUTE PROVIDING FOR A SINKING FUND FOR THE PAYMENT OF SECURITIES CANNOT BE CHANGED TO THE DETERIMENT OF SECURITY HOLDERS AND A COURT OF EQUITY WILL ENFORCE COLLECTION OF THE FUND.

Kennedy v. City of Sacramento, 19 Fed. 580, 584;

Louisiana v. Pilsbury, 105 U. S. 278, 282, 287, 298, 299 and 300;

Kennedy v. Sacramento, 19 Fed. 580, 584.

where the Court quoted with approval from a decision of the Supreme Court of California in *Meyer v. Brown*, 65 Calif. 583, 589, that

"It is well occasionally to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value, than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other." (Italics ours.)

L. THE LEGISLATURE CANNOT EVEN AMEND ITS OWN CONSTITUTION SO AS TO IMPAIR SUCH OBLIGATION.

New Orleans Gas Co. v. Luminous L. Co., 115 U. S. 650, 672.

POINT 12.

A question under the Federal Constitution was presented for determination.

The allegations in the bill of complaint (Tr. Rec., page 1, *et seq.*) and the decree of the District Court (Tr. Rec., page 130), makes it clear that a Federal Constitutional question is raised.

That such question is raised under the pleadings appears from:

Penn. Mutual, etc. Co. v. Austin, 168 U. S. 685, 695.

Leonard v. Shreveport, 28 Fed. 237.

American T. & T. Co. v. New Orleans, 176 Fed. 133.

Nashville C. & St. L. Ry. v. Taylor, 86 Fed. 168.

- Pacific Elec. Ry. Co. v. Los Angeles*, 194 N. S. 112.
Portland Ry. L. & P. Co. v. Portland, 210 Fed. 667.
Riverside & A. Ry. Co. v. Riverside 118 Fed. 736.
Risley v. City of Utica, 173 Fed. 502.
The Canada, 7 Fed. 730.
New Providence v. Oakley, 117 U. S. 336.
S. F. G. & C. Co. v. San Francisco, 189 Fed. 943.

The case of *New Orleans v. Ry. Term.*, 153 N. S. cited by our opponents to the contrary, clearly is not in point, because no real and substantial dispute, involving the Federal Constitution arose.

POINT 13.

In view of the fact that the appellant is the holder of improvement certificates for value, the very large sum of money which he paid for the same having benefited the respondent by virtue of increased tax valuation and otherwise through the improvements made for its predecessor, and the gross injustice that must necessarily continue to exist if the relief prayed for be not granted, and the fact that the respondent is clearly by its charter successor of Long Island City in burden as well as benefit, and further that it should not be

permitted to be relieved of liability by virtue of its own wrongful delay in action and long-continued failure to perform its duty—it is respectfully submitted that the relief prayed for or such other relief as may rectify the wrong committed should have been granted to the complainant; and

The decree appealed from should be reversed, with costs, and the cause should be remanded to the lower Court in order that complainant may be afforded the relief prayed for.

Respectfully submitted,

REED, McCOOK & HOYT,
Solicitors for Complainant-Appellant.

CHARLES K. ALLEN,
LEON ABBETT,
Of Counsel.

Office Supreme Court, U. S.
FILED

APR 7 1918

JAMES D. MAHER,
Argued by TERENCE FARLEY, Esq.

Supreme Court of the United States

October Term, 1917.

No. [REDACTED] 315

ELIAS C. BENEDICT,

Appellant,

against

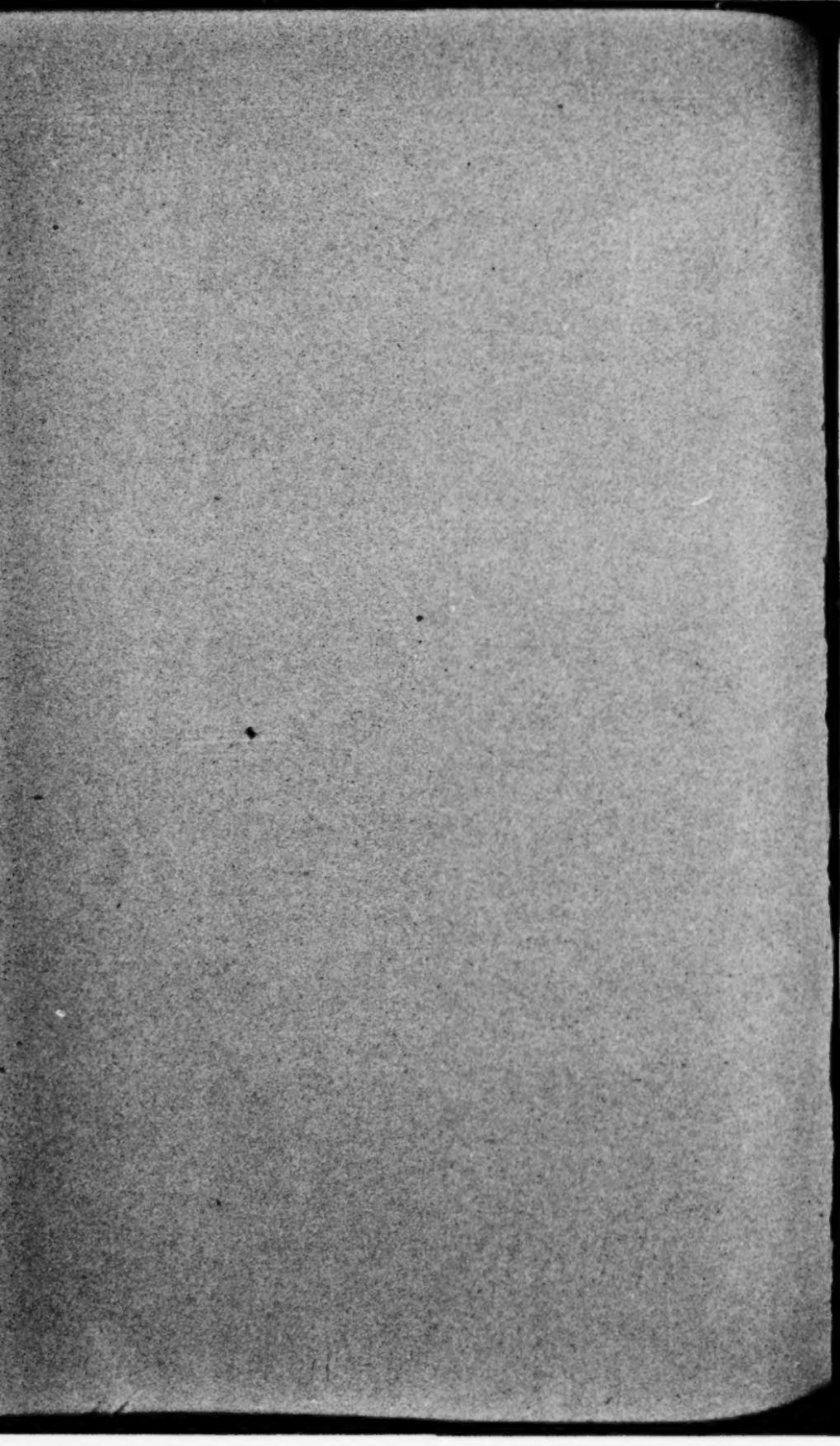
THE CITY OF NEW YORK,

Appellee.

BRIEF ON BEHALF OF THE CITY OF NEW YORK, APPELLEE.

WILLIAM P. BURR,
Corporation Counsel.

TERENCE FARLEY,
GEORGE P. NICHOLSON,
of Counsel.



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Supreme Court of the United States

October Term, 1917.

ELIAS C. BENEDICT,
Complainant-Appellant,
against
THE CITY OF NEW YORK,
Defendant-Appellee.

No. 789

Appeal from Decree of Circuit Court of Appeals
affirming Decree of District Court dismissing Bill of
Complaint, in suit by Beneficiary to compel alleged
Trustee of Express Trust to account

(Reported below, 235 Fed., 258; affd. 247
Fed., 758.)

BRIEF ON BEHALF OF THE CITY OF NEW YORK.

This appeal was taken by complainant, presumably under Section 240 of the Judicial Code, from a decree of the United States Circuit Court of Appeals, in and for the Second Circuit, which affirmed a decree of the District Court of the United States for the Southern District of New York, after a trial of the issues before District Judge LEARNED HAND.

Statement.

Contending that the defendant, as the successor of Long Island City, is *the trustee of an express trust*, created by chapter 326 of the Laws of 1874 (*post*, p. 109), and that he is one of the beneficiaries of that trust, complainant filed a bill in equity to compel the defendant, as such trustee, to account.

The statute in question created an Improvement Commission which was authorized to make certain improvements in what was then known as the First Ward of Long Island City. For the purpose of paying for the improvements, the Commission was authorized to issue certificates. To secure the payment of these certificates, assessments were levied on certain properties in Long Island City. The statute provided that if, at the end of ten years, the assessments were not paid, the properties should be sold by the Receiver of Taxes.

Complainant's proposition, in a nut shell, is that the members of the Commission and their employees, and those who assisted them in the performance of their duties, under that legislation, were local officers of Long Island City, and that that municipality and its successor, the present defendant, is liable for their wrongful acts.

And he contends, in particular, that the defendant and its predecessor were guilty of the following breaches of the alleged *express trust*:

(1) that Improvement Certificates, which had depreciated in value, were received, at their par value and accrued interest, in payment of the assessments on the properties;

(2) that they were likewise received in redemption of the properties after the liens of the assessments had been foreclosed and the properties had been sold; and

(3) that the properties, which were burdened with the liens of the assessments, were, in many instances, sold for less than the amounts of the assessments.

Bill of Complaint.

The bill of complaint is very voluminous, and, in order to appreciate the contentions of the complainant, a chronological reference to the facts is necessary.

Chapter 461 of the Laws of 1871 of the State of New York is entitled

"An Act to revise the charter of Long Island City."

Most of its provisions are not germane to the present discussion but some of them are referred to and relied upon by the complainant. Section 23 of Title VI of that enactment (page 939) provided that:

"§23. Before any such sale of lands for unpaid taxes and assessments, an order shall be made by the common council, which shall be entered at large in the records of the city, designating and directing said attorney or other officer of the city to sell, and particularly describing the premises to be sold, and the owner or agent thereof, so far as the same is known to the common council, and the tax or assessment for which the sale is to be made, a copy of which shall be delivered to the officer so designated, who shall forthwith advertise the sale of said premises in the manner and for the time required in the case of sales of real estate in execution, and the sale shall be conducted in the same manner, except as herein provided. The proceedings may be stopped at any time before sale, by any person, by paying the officer his fee, and the amount of the tax or assessment, with the interest and percentage allowed by this act, and the expenses of advertising. All sales in such cases shall be made for the shortest period for which any person will take the premises and pay the tax or"

assessment, interest, percentage and expenses. Two certificates of sale of each parcel of land so sold will be made by said officer, one of which shall be delivered to the purchaser and the other filed in the city clerk's office. Such certificate shall contain a description of the property, the name of the purchaser, and the term for which it was sold, and shall state the particular tax or assessment, and the amount of the tax and assessment, interest and expenses for which the sale was made, and the time when the right to redeem will expire.

• • • • •

“§ 26. If at any such sale no bid shall be made for any parcel of land, the same shall be struck off to the city for the term of one hundred years, and thereupon the city shall receive, in its corporate name, one of the certificates of the sale thereof, and shall be vested with the same rights as any other purchaser.”

And by Title III, Chapter I (page 903), it is provided that

“§12. The common council shall have the management and control of the finances, and all property, real and personal, belonging to said corporation, and shall have the power, within said city, to make, establish, publish and modify, amend and repeal, rules, regulations and by-laws relating thereto.”

By chapter 765 of the Laws of 1871, entitled

“*An act to provide for the laying out of streets, avenues, roads and parks in Long Island City,*”

three certain persons, therein specifically named, were “appointed commissioners of street, roads, avenues and parks in Long Island City, for the purpose of performing the several acts and duties hereinafter prescribed.” And they were authorized to fill vacancies. That statute was

amended in certain immaterial particulars by chapter 859 of the Laws of 1872.

We now come to chapter 326 of the Laws of 1874, entitled

"An Act to provide for improvements in and adjoining the first ward of Long Island City."

That legislation is so important that, for convenience of reference, we have annexed a copy of it as an Appendix to these Points (*post*, p. 109).

This improvement work was commenced about 1875 (p. 43). As appears by Exhibit "A" (p. 27), a number of Improvement Certificates were issued to Farwell, Sage & Co., the contractors for the work, prior to June 9, 1879.

Chapter 501 of the Laws of 1879, entitled

"An Act to prepare for and aid in closing up the business of the improvement commission in Long Island City,"

provides, in section 10, that:

"At the sale of any lot, piece or parcel of land for non-payment of assessments or interest thereon, as provided for by section five of said act, it shall be the duty of the officer making such sale to receive the improvement certificates authorized by the act aforesaid at par and accrued interest, in payment of the assessments and accrued interest for which such sales shall be made, exclusive of the cost of sale, in the same manner, to the same extent, and with the same force and effect, and such certificate when received by him shall be permanently and effectually canceled and defaced by, and deposited with, the same officer, and a like account shall be kept thereof as now provided by law for the receipt, cancellation and defacement of such improvement certificates

when received in payment of such assessments and accrued interest."

Section 4 of Chapter 656 of the Laws of 1886, entitled

"An Act in relation to unpaid taxes, assessments, water rates and rents in Long Island City, and to collect the same, and to insure a more efficient collection of the same in the future,

provides that:

"§ 4. On the day named in the notice the said treasurer or his representative shall commence the sale of the said several parcels of real estate at auction for the lowest terms of years for which any purchaser will take the same and pay the aggregate amount due thereon, and if no person shall so offer to purchase such property for a term of years, said treasurer or his representative shall sell such parcel in fee-simple to the highest bidder, and shall continue such sale from day to day until the whole thereof shall have been offered for sale or the sale duly adjourned, as hereinafter provided; but the owner of any piece or parcel of land may discharge the same before the actual sale thereof, by paying the tax or taxes or assessments and water rates and rents, and county and State taxes, for which it is to be sold, with all accrued interest, percentage and expenses. Said treasurer shall bid in in the name of the city and for the use of the proper fund or account all parcels of real estate at such sale and to be sold for unpaid taxes, assessments, water rates and rents which shall not be sold to any other person. Such sale may be adjourned from time to time by oral announcement, without any other publication or notice. All taxes, assessments, water rates and rents collected under such sales shall be applied by the treasurer in the manner prescribed by law. Any parcel, however, may be exempted from such sale for taxes or water rates or rents by the payment annually, and before the date fixed for such tax sale, of the taxes and water rents

or rates, with interest due thereon, then longest in arrears, together with the annual taxes and water rents or rates thereon which have been levied subsequent to the first day of December, eighteen hundred and eighty-five, and which shall be levied thereon hereafter, with interest and penalties due at the time of such payment. Except that at the first sale under the provisions of this act the payment of the taxes, water rates and rents and penalties and interests thereon levied subsequent to the first day of December, eighteen hundred and eighty-five, shall exempt such parcel from such first sale."

"§9. If such real estate, or any part thereof, be not redeemed as herein provided, the said treasurer shall execute to the purchaser, including said city, or the heirs, successors or assigns of such purchaser, a lease, or if sold in fee, a conveyance of the real estate so sold, which conveyance shall vest in the grantee an absolute estate in fee, and the lien or liens for which the same shall have been so sold shall thereupon be cancelled. Such leases and conveyances shall be executed and acknowledged by said treasurer in the form required in conveyances of real estate to authorize the recording thereof. The premises conveyed need not be described other than by said lot and block number, and the dimensions of any lot shall be deemed to be those of said lot as laid out upon the official city map, and when so executed shall be presumptive evidence that the proceedings under this act were regular, and also presumptive evidence that all previous proceedings in levying the taxes, assessments, water rates and rents mentioned therein, were regular and according to law. Every certificate and conveyance executed in pursuance of this act may be recorded in the same manner and with like effect as a deed acknowledged or proved before any officer authorized by law to take the proof and acknowledgment of deeds. *The common council of said city may at any time by resolution direct a sale of any lot or lots acquired by said city under the provisions of this act, at a price not less than*

*that fixed by them in said resolution, and said treasurer shall thereupon advertise said lot or lots once a week for three weeks in all official newspapers of said city, if there be any, and if not, then in any two newspapers published in said city, and shall sell the same on the day of sale, or on any adjourned day thereafter, to the highest bidder, but at not less than the price fixed by the common council. When said city shall have so sold any lands under directions of the common council, all liens of said city thereupon for taxes, assessments, water rates or rents, for which the same shall have been sold, shall thereupon be cancelled of record by the said treasurer. Conveyances by said city pursuant to such sales shall be *prima facie* evidence of the regularity of all prior proceedings, and shall be executed by the mayor and city clerk of said city, and have the seal of said city attached. It shall also be the duty of the attorney and counsel to the corporation of said city to prepare the deeds as hereinbefore provided and for necessary disbursements and the compensation of clerks which he is hereby authorized to employ in the performance of the duties hereby imposed, said attorney and counsel shall be entitled to receive from said city the sum of one thousand dollars per annum in addition to his salary as fixed by law."*

As appears by Exhibits P and R (pp. 106-107), a tax sale was held in Long Island City in 1886. The properties which were then sold, for less than the amount of the taxes, were bid in by Long Island City.

There was another tax sale in 1888 (Exhibit U, p. 107; Exhibit W, p. 108; Exhibit II, p. 112). It also appears that at this sale some of the properties sold did not realize the amount of the liens, and that some of them were bid in by Long Island City.

In the latter part of 1889, or the early part of 1890, one James Ryan brought a mandamus proceeding against Frederick W. Bleckwenn, the Treasurer of Long Island

City, to compel him to receive Improvement Certificates, issued under chapter 326 of the Laws of 1874, in payment of the amount required to redeem his property from the sale for the non-payment of the assessments, which had been levied upon it, by virtue of that statute, and it was held by Justice Cullen, afterwards Chief Judge of the Court of Appeals of the State of New York, that the Treasurer was compelled to receive such certificates in payment of the amount required for the redemption of the property.

Upon appeal to the General Term of the Supreme Court of the Second Department, Justice CULLEN's ruling was sustained and his opinion was adopted.

People ex rel. Ryan v. Bleckwenn, 8 N. Y. Supp., 638.

Notwithstanding this ruling and others, to which we will hereafter refer, the claim is now made that the Treasurer, under such circumstances, had no power to accept the Improvement Certificates, either in payment of the assessments or in redemption of the properties from the sales for the non-payment of the assessments.

It also appears that, at the tax sale held in 1890, various parcels were sold for less than the amounts of the liens and that, in a number of instances, the parcels were bought in by Long Island City.

Plaintiff's Exhibit X, p. 108.

Plaintiff's Exhibit Z, p. 109.

Plaintiff's Exhibit BB, p. 109.

Following its ruling in the *Ryan* case (*supra*), it was held by the same Court, in

People ex rel. Oakley v. Bleckwenn, 13 N. Y. Supp., 487,

which was decided in February, 1891, that the Treasurer was obliged to receive the Improvement Certificates when the properties, which had been sold, were redeemed. Upon appeal to the Court of Appeals, that decision was affirmed. That Court declared these substantive propositions:

(1) An owner of lands sold for unpaid assessments thereon, made under the provisions of the act providing for improvements in Long Island City (chap. 326, Laws of 1874), is entitled to use "improvement certificates," issued under said act, for the purpose of redeeming the lands sold, and, upon tender of the requisite amount in such certificates, it is the duty of the city treasurer to receive them.

(2) The effect of said act is not limited in this respect by the provisions of the amendatory act of 1879 (chap. 501, Laws of 1879), or of the act of 1886 (chap. 656, Laws of 1886), which was in force at the time the assessments became due, and under the provisions of which sales were required to be made.

(3) Where, under the provisions of an act authorizing sales of land for unpaid assessments thereon for a municipal improvement, provision is made for redemption after the sale, and before a conveyance under it, the sale does not transfer a title, but the lien of the assessment continues until the sale is consummated by deed or lease, as provided; the purchaser only acquires this lien, which he holds in effect as assignee, until his inchoate rights are consummated and the title of the owner divested by the execution of a conveyance.

People ex rel. Oakley v. Bleckwenn, 126 N. Y., 310.

On the 12th day of January, 1892, a notice was given by the Treasurer and Receiver of Taxes that, on March 15, 1892, he would sell, "at Public Auction, for the unpaid Assessments for the Improvements in and adjoining the First Ward, * * *" certain parcels of real estate. And he notified the public that the sale would be "for the lowest term of years for which any purchaser will take the same and pay the aggregate amount due thereon, or, if no person shall so offer to purchase, then in fee simple to the highest bidder."

Exhibit "MM," page 74.

During the progress of that sale, one Charles Wanninger, a representative of the complainant, so far as his Long Island City matters were concerned (p. 72), had a conversation with Bleckwenn, the City Treasurer, and, to quote his own language, "I objected in the way he was conducting the sale, selling the property for less than the amount of the assessments and the accrued interest. * * * We said that he was receiving improvement certificates in payment for less than the amount of the assessment and accrued interest, contrary to the sales conducted theretofore. * * * Also that a person going in there and paying cash and having no certificates, was placed on the same basis as a person who would buy the lots in improvement certificates—that the money had no more value than the improvement certificates because the improvement certificates were worth less than the money on the average" (p. 73).

Evidently Bleckwenn paid little, if any, attention to these protests, because, as Wanninger expresses it, "He said he was going on with the sale and he was going to sell the property" (p. 75). Nothing was done by the complainant, by injunction or otherwise, to stop that sale

in that particular manner. If, as he now contends, that procedure were illegal, that is what he should have done.

Alsop v. Riker, 155 U. S., 448, 460-461.

The sale took place. Two thousand and eleven lots were sold. The overbids amounted to \$62.69 and the underbids to \$2,111,279.25 (p. 67).

Exhibits "CC," "EE," "GG" and "II," pp. 110-114.

While that sale was in progress, in July, 1892, it was decided by the General Term of the Second Department, in

Nelson v. Bleckwenn, 19 N. Y. Supp., 993, that

"Under Laws of 1874, c. 326, which authorized the issue of 'improvement certificates in Long Island City,' in payment of certain improvements, and provided that they should be receivable in payment of any assessment, and Laws 1879, c. 501, which required the officer making a sale of any land for non-payment of the assessment on it to receive such improvement certificates in payment of the assessments, and which acts authorized the use of such certificates for the purpose of redeeming land sold for unpaid assessments, the certificates can be used for redeeming from a sale for an unpaid assessment, though the sale may have been made for less than the assessment and interest."

Before the sale of 1892, there were outstanding certificates amounting to \$1,760,000. After the sale there was approximately \$300,000 worth of securities outstanding (p. 76).

Our understanding of the record is that, with very few exceptions, all the properties which were encumbered

with the liens of the assessments were sold at the 1892 sale.

Subsequently, on the authority of *People ex rel. Oakley v. Bleckwenn* (126 N. Y., 310), the Court of Appeals affirmed the ruling of the lower Court.

Nelson v. Bleckwenn, 137 N. Y., 565.

Shortly after that decision was announced, on the 28th day of February, 1893, Nelson, the plaintiff in that suit, wrote (pp. 123-124) to Bleckwenn as follows:

"PLAINTIFF'S EXHIBIT SS.

"New York, Feby. 28, 1893.

"Mr. FREDERICK W. BLECKWENN,
"Treasurer and Receiver of Taxes,
"Long Island City.

"Dear sir—You are hereby notified that as to any and all of the lots purchased by me in fee on the 24th day of October, 1892, at the sale made by you for unpaid assessments in Long Island City, you are not to receive in redemption anything except lawful money of the United States, and that in case you receive improvement certificates **I will hold you personally responsible** for any loss which may result to me from your so doing.

"I furthermore notify you that, in case of a redemption being made upon any property which may have been sold by you in fee for non-payment of an assessment, where the amount for which the sale was made was less than the amount due for the assessment and interest, you are not permitted to cancel the assessment upon your books; but that the amount so paid for redemption, less the interest and expenses of the sale, is to be credited as payment on the assessment, leaving the assessment still in force for the balance which may remain after such credit.

"Respectfully yours,

"WM. NELSON."

This was followed by a similar communication from Wanninger, the agent of the complainant. We quote Plaintiff's Exhibit "NN" (p. 81):

"New York, Mech. 1, 1893.

"Mr. FREDERICK W. BLECKWENN,
"Treasurer and Receiver of Taxes,
"Long Island City, N. Y.

"Dear Sir—You are hereby notified that as to any and all of the lots purchased by me in sale on the 24th day of October, 1892, at the sale made by you for unpaid assessments in Long Island City, you are not to receive in redemption anything except lawful money of the United States, that in case you receive improvement certificates **I will hold you personally responsible** for any loss which may result to me from your so doing.

"I furthermore notify you that, in case of a redemption being made upon any property which may have been sold by you in case of non-payment of an assessment, where the amount for which the sale was made was less than the amount due for the assessment and interest, you are not permitted to cancel the assessment upon your books; but that the amounts so paid for redemption, less the interest and expenses of the sale, is to be credited as a payment on the assessment, leaving the assessment still in force for the balance which may remain after such credit.

"Respectfully yours,

"CHAS. WANNINGER."

Another notification given by Nelson to Bleckwenn is Plaintiff's Exhibit "OO" (p. 82). That reads as follows:

"New York, March 28/93.

"Dear Sir—I hereby notify you that should any party desire to redeem any lot, the fee of which was purchased by me at assessment sale held by you of lots in the 1st Ward of Long Island City, and should pay you with 1st Ward Improvement Certificates of Long Island City, you are to immediately cancel and retire such certificates in accordance with the express requirements of the law under which such certificates were issued; and I further notify you that I will not receive anything from you in settlement of my fee to lot or lots, other than the lawful money of the United States, and I shall hold you accountable for any loss I may suffer by reason of your acting contrary to above notification.

"WILLIAM NELSON.

"F. W. BLECKWENN."

Thereafter, on the 30th day of June, 1893, complainant, in a suit brought by him against Bleckwenn, in the Circuit Court of the United States for the Eastern District of New York, obtained an order from Judge BENEDICT

"enjoining and restraining the defendant from receiving upon any redemption from the sales made by him to the complainant herein, Elias C. Benedict, of lands in Long Island City for non-payment of assessments levied thereon under the act of the Legislature of the State of New York, passed on the 5th day of May, 1874, entitled, '*An Act to provide for improvements in and adjoining the First Ward of Long Island City,*' a more particular statement of the lands so sold being set forth in the said bill of complaint, anything except legal tender money of the United States, and also restraining said defendant from marking upon his books as paid any assessment levied under said act upon said lands so bought

by the complainant as to which property affected thereby has been sold by said defendant thereunder for less than the amount due thereon, until the further order, judgment and decree of this Court; this order being made without prejudice to the rights of either party or to the said motion."

Plaintiff's Exhibit "JJ," p. 114.

What became of that suit does not appear. And so far as the record discloses, there were very few sales after that date (Plaintiff's Exhibit "PP," pp. 115-116).

On the 1st day of January, 1898, when the Greater New York Charter (chap. 378 of the Laws of 1897) took effect, there were no properties which could be sold to satisfy the assessment liens.

Now if, as the complainant claims, Long Island City, under the Act of 1874, were the trustee of an *express* trust, and that municipality has been, so to speak, dissolved by the Legislature, what obligations are imposed upon The City of New York? Section 4 of chapter 378 of the Laws of 1897 provides, in part, that

"All valid and lawful charges and liabilities now existing against any of the municipal or public corporations * * * which by this act are made part of the corporation of The City of New York, * * * or which may hereafter arise or accrue against such municipal and public corporations * * * which but for this act would be valid and lawful charges or liabilities against the same, shall be deemed and taken to be like charges against or liabilities of the said The City of New York, and answered unto by it to the same extent, and no further than the said several constituent corporations would have been bound if this act had not been passed."

One of the more important questions, which will have to be considered, therefore, is, whether, on the 31st day

of December, 1897, the complainant had a valid and lawful charge against, or whether a liability existed in his favor against Long Island City. That he did not, and that he conceded that he did not have such a charge and liability, is apparent, we think, from the correspondence which subsequently ensued.

Chapter 686 of the Laws of 1904, entitled

"An Act to authorize the comptroller and corporation counsel of the city of New York, on behalf of said city, to compromise and settle with property owners interested, certain claims for taxes, assessments and sales for the same, and for or on account of evidences of indebtedness issued on account of local improvements in the territory formerly included within the boundaries of Long Island City,"

became a law on May 9, 1904. Pursuant to its provisions, the complainant, on the 21st day of February, 1905, filed a claim with the Comptroller.

Plaintiff's Exhibit "A," pp. 92-97.

After referring to the provisions of chapter 656 of the Laws of 1886 (*ante*, p. 6), which he calls the "Tax Act," he stated

"That it is clearly evident from these provisions that no lot upon which an assessment has been imposed should be sold for less than the full amount due thereon, and that in case no outsider bid such amount, either on a lease or in fee, it then became the duty of the Treasurer to bid in the said lot for the city, for the amount of the assessment due, which amount would then be credited to the special First Ward Improvement Fund. The city would then own the lot, subject to redemption by the original owner

for the full amount and 12 per cent. interest, but if he failed to redeem the City might sell through its Common Council the lot so purchased and thus recoup itself.

"That, contrary to the provisions of said act, and in violation thereof, the Treasurer of said City sold all the lots upon which assessments had been laid under said General Improvement Act to the highest bidder therefor, without reference to the amount of assessments due thereon, and did not bid in the same for the said City for the whole amount due for such assessment with 'interest, percentages and expenses.'

"That at the time such sales were held by said Treasurer there was due for such assessments the sum of \$1,074,419.06, but that the land on which these assessments were a lien was sold by said Treasurer to the highest bidder in fee simple for the sum of \$484,500.57, leaving a deficit of \$589,918.49, which amount would have been amply large enough to have paid in full, with interest, the unredeemed certificates then outstanding, amounting to the sum of \$302,840, of which those shown in Schedule 'A' hereto annexed are a part."

A similar claim was filed by Wanninger on the 14th day of May, 1904 (Exhibit "B," p. 52).

Four years later, on the 26th day of May, 1909, Leon Abbott, Esq., on behalf of the holders of two hundred and eighty-three certificates, presented a "memorial and statement of facts" (p. 120) to the Comptroller, and he requested "that provision should be made in some way for the payment of the amount due us upon our certificates—the same representing actual value to us" (Plaintiff's Exhibit "RR," pp. 120-123).

Subsequently, on the 19th day of March, 1910, pursuant to the provisions of chapter 601 of the Laws of 1907 (now section 246 of the Charter of The City of New York), which relates exclusively to "*an illegal or invalid*

*claim against the city, but which, notwithstanding, * * * it is equitable and proper for the city to pay in whole or in part * * *,*" the complainant requested the Comptroller to "refer the said claim to the Board of Estimate and Apportionment for determination as therein provided" (p. 100).

Plaintiff's Exhibit "D," pp. 97-100.

And a similar request was made in the communication of April 26, 1910, wherein it was stated by his attorneys "that in the event it should be deemed that Mr. Benedict's claim was not a valid one legally, but was one which should be paid in equity and in good conscience, that the same be forwarded to the Board of Estimate and Apportionment, under the provisions of the Act of the Legislature of 1907, * * *."

Plaintiff's Exhibit "E," p. 101.

Notwithstanding the testimony of Benner (p. 53), one of the complainant's attorneys, that he had never been notified that the complainant's claims had been rejected, it appears, by Plaintiff's Exhibits "K" and "L" (pp. 105-106), that both the Deputy and the Comptroller himself notified the complainant, through his attorneys, that the claims had been rejected.

Shortly thereafter the present suit was commenced. Now what are the complainant's grievances? He contends

- (1) that, under chapter 326 of the Laws of 1874, none of the properties, which was subjected to the lien of the assessment, could be sold for less than the amount of the assessment;

(2) that, on such sale, the property had to be sold for legal tender and that it was illegal to receive payment for it in certificates;

(3) that the property which had been sold could only be redeemed in legal tender and not by the payment or transfer of certificates;

(4) that the acts of the Legislature, which permitted this procedure to be followed, were unconstitutional and void;

(5) that the Commissioners, who were appointed under chapter 326 of the Laws of 1874, as well as the officers who assisted them in making the sales, etc., were local officers of Long Island City, for whose acts that municipality was liable; and

(6) that The City of New York, as the successor of Long Island City, has assumed its liabilities.

Bill of Complaint, pp. 1-27;
Assignments of Error, pp. 131-134.

Answer.

In addition to putting in issue the material allegations of the complaint, the defendant pleads as affirmative defenses:

(1) the six years statute of limitations (paragraph XV, p. 31).

New York Code of Civil Procedure, § 382.

(2) the twenty years statute of limitations (paragraph XVI, p. 32).

New York Code of Civil Procedure, § 381.

(3) laches (paragraph XVII, p. 32).

(4) the ten years statute of limitations (Amendment, p. 125).

New York Code of Civil Procedure, §388.

Disposition of Suit by District Court.

On the facts which we have stated, Judge HAND held:

(1) that, conceding that the City, as trustee, was bound to preserve the lien of the assessments for the protection of the certificates, it repudiated the trust when it made such sales, and that a suit against it for breach of the trust, brought in a federal court of equity 18 years afterwards and 17 years after the decision of the state court, by a certificate holder, who had knowledge of the decisions at the time, was barred under the state statute of limitations; and

(2) that, in the absence of special equities, it is the practice of the federal courts of equity to follow the local statutes of limitations.

Opinion, pp. 125-130.

Assignments of Error on Appeal to Circuit Court of Appeals.

The principal assignments were

(3) that error was committed in holding that the decisions of the state court, construing the various statutes in question, were conclusive;

(4) and (5) and (11) that the District Court erred in refusing to hold that chapter 501 of the Laws of 1879, and chapter 656 of the Laws of 1886, in so far as they purported to give purchasers at the assessment sales

the right to use the certificates in payment for the lands purchased by them, were constitutional;

(6) and (7) that the Court erred in holding that the complainant's rights were barred by the statute of limitations and by laches;

(8) that the Court erred in holding that the only duty, as "Trustee, of the City of Long Island City or its said City Treasurer and Receiver of Taxes," under chapter 326 of the Laws of 1874, consisted in foreclosing the lien of the assessments for the benefit of the holders of the certificates, and in keeping and distributing among them the proceeds of the sales;

(9) and (10) that the Court erred in holding that the sales, for less than the amount of the assessments, etc., was the final execution of the trust duty;

(12) that the Court erred in holding that the breach of trust, in selling the assessed lands for less than the amount of the assessment, etc., was a repudiation of its trust duties under chapter 326 of the Laws of 1874;

(13) that the Court erred in not holding that there were trust duties still to be performed after the sale of the assessed lands for less than the amount of the assessments, etc.;

(14) that the Court erred in not holding that the sale of the assessed lands for less than the amount of the assessments, etc., and receiving the certificates in payment, was in violation of section 23 of title 6 of chapter 461 of the Laws of 1871, which was in force at the time the complainant acquired the certificates and which provided that all sales for taxes should be made for the shortest period for which any purchaser should take the premises and pay the taxes or assessment, etc.; and

(15) that the Court erred in holding that the time occupied by the complainant, in attempting to negotiate the settlement of his claim, was not an excuse for delaying the commencement of this suit.

Disposition of Appeal by Circuit Court of Appeals.

Upon appeal, the Circuit Court of Appeals held (we quote the headnotes) :

(1) that, where a suit involves a real and substantial controversy respecting a federal question, raised in good faith, the jurisdiction of a federal court does not depend on diversity of citizenship, nor on the validity of the claim asserted.

And the Court assumed, for the purposes of reaching its conclusion,

(2) that a legislative act, appointing commissioners to make a city improvement and to pay for the same by the issuance of improvement certificates, payable only out of a special fund, to be created by the levy and collection by designated city officers of assessments on the property within the district, created a *statutory trust* for the benefit of the holders of the certificates, enforceable against all parties charged with its execution;

(3) that, when in such a case, the city treasurer, charged by the statute with the duty of selling the property, the assessments against which remained unpaid after ten years, sold certain of the property for less than the assessments against it and accrued interest, the result being the cancellation of all liens and leaving insufficient in the fund to pay outstanding certificates; such action was an open repudiation of the trust, which gave holders of certificates an immediate right of action for its breach and a certificate holder, who with knowledge

of such action, delayed bringing suit until it was barred by limitation under the laws of the state, will not be given equitable relief in a federal court;

(4) that, in the absence of any statute of limitations enacted by Congress, the federal courts of equity usually follow the state statutes, even in suits which depend upon or arise under the laws of the United States; and it concluded

(5) that, where a complainant delayed for 17 years, after the open repudiation of a trust, before making any persistent effort to enforce it, he will be denied relief in equity on the ground that his demand is stale.

Benedict v. City of New York, 247 Fed., 758.

If, as stated by Circuit Judge RODGERS (at p. 760): "*It is evident that the complainant bases his right to sue, not upon diversity of citizenship, although he is a citizen of Connecticut, and defendant is a citizen of New York, but upon the ground that a federal question is involved*"; then, we contend, under sections 128 and 238 of the Judicial Code, that the Circuit Court of Appeals should not have entertained jurisdiction and that the complainant's remedy, in the first instance, was to appeal from the District Court direct to the Supreme Court.

Judicial Code, sec. 238.

By referring to the opinion of the Court below, it will be perceived that it did not directly pass upon the constitutionality of the statutes involved. It held, in effect, that, assuming that they were unconstitutional, the complainant was not entitled to any relief because, if the cause of action were not barred by the state statutes of

limitation, the complainant was guilty of such laches as prevented him from maintaining the present suit.

Assignments of Error.

His present assignments of error (pp. 154-158) are practically based on the propositions

- (1) that the Circuit Court of Appeals erred in not holding, "*except by implication only,*" that the statutes in question are unconstitutional (Nos. 5 and 6); and
- (2) that it erred in holding that his rights were barred "by any statute of limitations" (No. 7), or "by laches" (No. 8).

In opposition to the appeal, the appellee urges the following

P O I N T S .

I.

If, as the appellant now contends (Brief of Complainant-Appellant, page 212), "The allegations in the bill of complaint and the decree of the District Court make it clear that a federal constitutional question is raised," then, under Section 238 of the Judicial Code, he should have appealed from that decree directly to this Court.

Instead of doing so, however, the complainant appealed to the Circuit Court of Appeals. We understand that, by so doing, he has waived his right to take a direct appeal to this Court.

Robinson v. Caldwell, 165 U. S., 359, 361;
Carler v. Roberts, 177 U. S., 496, 499;
Cincinnati, Hamilton, etc., Railway Co. v. Thiebaud, 177 U. S., 615, 620;
Loeb v. Columbia Township Trustees, 179 U. S., 472, 478;
Haguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S., 290, 295;
MacFadden v. United States, 213 U. S., 288, 293.

II.

In a case where the Circuit Court of Appeals has passed upon the question of its jurisdiction and the alleged unconstitutionality of a State law, impliedly in favor of a plaintiff, but has decided against him on the merits, the plaintiff cannot appeal directly to this Court for the purpose of securing an additional review of the suit on the merits.

Anglo-American Provision Co. v. Davis Prov. Co., 191 U. S., 376;
Empire State Mining Co. v. Hanley, 198 U. S., 292, 298.

III.

Moreover, if it be claimed that this appeal is taken, as a matter of right, under Section 241 of the Judicial Code, it is clear that this Court has no jurisdiction for the reason that there is no "matter in controversy" which exceeds one thousand dollars.

This is a suit in equity to enforce an alleged trust and for an accounting, and the relief which the complainant prays is

"(c) That the said trust be enforced by this Court and an accounting be taken of the amounts that would have been received by said City and its said City Treasurer and Receiver of Taxes from the sales of said lands for

non-payment of assessments, *if the same had been sold*, as should have been, *for the full amount of assessments thereon with interest*, as in said Act of 1871 provided to be done; and of the part thereof to which your orator, and such others as may be joined herein, would be and are entered upon said certificates owned by him and them as aforesaid, and *that such amount as may be due to your orator, or said other parties upon said accounting as aforesaid, with interest, may be ordered to be paid to your orator and said other parties*" (p. 26).

Manifestly, until such an accounting be had, assuming that one be decreed, there is no way of determining, from the record, the amount of the matter in controversy. In such instances, this Court will decline jurisdiction.

Morgan v. Adams, 211 U. S., 627.

IV.

The right to pay the assessments, which had been levied, pursuant to chapter 326 of the Laws of 1874, and to redeem the property, which had been sold for assessments, with improvement certificates, was expressly conferred by that statute.

Section 6 of that enactment (*post*, pp. 117-118) expressly provides that:

"The improvement certificates hereinafter provided for shall be receivable at all times at par and accrued interest in payment of any assessment under this act, and of the interest accrued thereon."

And in section 9 (*post*, p. 121) it is provided that:

"They (the certificates) shall be receivable at all times, at par and accrued interest in payment of any assessments laid under this act and of the accrued interest thereon and shall be payable with interest as aforesaid in the manner hereinabove provided, out of any moneys which shall come into said treasurer's hands to the credit of said improvement fund."

So far as these particular questions, therefore, are concerned, they must be entirely eliminated from consideration.

The Assignments of Error, to the extent that they assume that either chapter 501 of the Laws of 1879, or chapter 656 of the Laws of 1886, gave to the City Treasurer and Collector of Taxes of Long Island City the right to accept First Ward Long Island City Improvement Certificates, issued under said chapter 326 of the Laws of 1874, in payment of assessments, are entirely misleading.

That we are correct in our contention will appear by a reference to the cases which construed the Act of 1874.

People ex rel. Ryan v. Bleckwenn, 8 N. Y. Supp., 638;

People ex rel. Oakley v. Blackwenn, 126 N. Y., 310;

Nelson v. Bleckwenn, 19 N. Y. Supp., 993; affd., 137 N. Y., 565.

In the *Ryan* case (*supra*), the following opinion of Justice CULLEN was adopted by the General Term of the Second Department:

"While the mode of sale was governed by the Act of 1886, the disposition of the funds arising upon the

sale is prescribed by the original Act of 1874, which provided for the improvement for which the assessment has been laid. By that act the moneys produced, either by the payment of the assessments or by the sale for an unpaid assessment, do not pass into the general treasury of the city, but are held as a separate and distinct fund, to be applied only to the satisfaction of the improvement certificates. **By section 9 of the act it is provided that those certificates shall 'at all times' be receivable at par and interest in payment of the assessments.** The language of the statute is very broad: 'Shall be receivable at all times' in payment of the assessments. I do not think the certificate on the sale is a substantially different thing from the assessment. The owner has a right to redeem within a given time, and until the expiration of the time for redemption is not divested of his property. **The redemption is substantially a payment of the assessment with the expenses of the sale and interest.** I think, therefore, a payment in improvement certificates good; and no harm or loss can occur to the city if enough is paid in cash to defray the expenses of the sale, and the interest payable to the purchaser. This the petitioner is willing to do. To the extent of the amount due on the assessment for principal and interest accrued at the time of sale, the redemption, in my opinion, can be made in the certificates. Motion granted."

In the *Oakley* case (*supra*), the Court of Appeals held, construing chapter 326 of the Laws of 1874, which authorized the issuance of the certificates, and which provided that such certificates shall be "*receivable at all times * * * in payment of any assessment*" levied to pay for them, that redemption from a sale made to enforce such assessment may be made in such certificates. And in the *Nelson* case (*supra*), which construed the same Act, it was held that such a certificate could be used

even though the amount bid at the sale was less than the amount of the assessment.

It also appears upon the face of the certificates, a copy of which is incorporated in Plaintiff's Exhibit "A" (p. 93), that it

"is receivable at par and accrued interest at any time in payment of any assessment laid under said act and of the accrued interest on such assessment."

This constituted notice to the complainant and is part of his contract.

Abbott, Public Securities, section 261.
37 Cyc., 1162-1163.

In addition, it was admitted by the complainant, in the Court below (Brief, pp. 79-80), that these acts did not cause the complainant any damage. All that is left in the case, therefore, is the question of the sales of the properties for less than the amounts of the assessments.

V.

Let us now consider the effect of chapter 501 of the Laws of 1879 and chapter 656 of the Laws of 1886, which, the complainant contends, if construed in a certain way, are unconstitutional.

In

People ex rel. Oakley v. Bleckwenn, 126 N. Y., 310, 315,

it was said by Judge GRAY:

"Is the provision of the Act of 1879 (see *ante*, p. 5), which makes it the duty of the selling offi-

cer to receive the certificates in payment of the assessments, for which the sales are made, as the appellant argues, a legislative construction of the law that no authority exists for the receipt of certificates after the sale has been made? I cannot think so, and such a conclusion is not compelled. As the law stood, under the Act of 1874, it was open to doubt as to whether, upon a sale of property for arrears of assessments, anything could be paid in by the purchaser except the currency of the country. The Legislature settled that doubt (and thereby further evidenced its benevolence of purpose) by expressly authorizing the use of improvement certificates in making payment at the sales. If, therefore, the Act of 1879 does not limit or control the construction of the provisions in the Act of 1874, that these improvement certificates 'shall be receivable at all times at par and accrued interest in payment of any assessment, etc.,' do we find any objection to their use, for the purposes of redemption after sales, from the incorporation in the Act of 1874 of those provisions of the Act of 1886 (see *ante*, pp. 6-7), which prescribe the proceedings for and upon sales and the manner of redemption?"

And, in conclusion, that learned jurist observed:

"* * * The purchaser having paid, as in this case, his bid in certificates, of course, is not prejudiced. As a matter of fact, it appears that upon all of the sales made under the Act of 1874, payments have been made in improvement certificates. It is altogether most unlikely that they would be made otherwise, and intending purchasers at such sales would be careful to avail themselves of this medium of payment, which could be obtained from the contractors, or other holders, at prices much less than their par value. That competition at sales might be affected, or limited to those who possessed certificates with which to make payment, should not affect the question. The operation of a law cannot be affected

by some imagined or possible result of its workings in some collateral direction. Besides, the plan of the statute was not to promote a market for the lands, when sold for unpaid assessments, but rather to provide for a substitute for money, generally available as a medium of payment to all affected by or interested in the performance of the work; which should be elastic enough to serve in payment of the contractors, in the first place, and to be receivable at all times in discharge of assessment liens and upon sales in enforcement of such liens."

As pointed out in the *Oakley* case (*supra*), section 4 of chapter 656 of the Laws of 1886 (*ante*, pp. 6-7), which was passed in relation to general city taxes in Long Island City, and which prescribed the mode of procedure by which that city may sell lands assessed for taxes and assessments, does not in any way affect the provisions of the Act of 1874, with respect to receiving the certificates in question in payment, and does not prevent their being received for the redemption of lands sold.

On the assumption that section 5 of chapter 326 of the Laws of 1874 prescribed a particular mode by which property should be sold for the payment of assessments, complainant argues that he acquired some sort of a vested right in that particular method of procedure and that, if section 4 of chapter 656 of the Laws of 1886 authorized a change in that mode, it is, to that extent, in so far as it interfered with his alleged vested rights, unconstitutional.

It is rather difficult to appreciate just what the complainant does contend. He presents both sides of the question (Points IV and VI). Referring to sales for

unpaid assessments, it is provided in section 5 of chapter 326 of the Laws of 1874 that

*"such sale or sales shall be made by the receiver of taxes or other officer then charged by law with the duty of selling lands in said city for non-payment of city taxes and the proceedings for such sale, and such sale shall be the same and on the same notice and like terms; * * *"*

This means, and only can mean, that, when those sales took place, which was to be ten years later than the Act of 1874, the laws, which were then in force and which governed other tax sales in that municipality, should apply to those proceedings.

We see no room for the contention that the "*then*" existing laws, governing the sales of property for unpaid taxes, were incorporated in and made part of the Act of 1874. But even if they were, how can a person acquire a vested right in what is commonly known as a mere matter of procedure?

See

Butler v. Palmer, 1 Hill, 324;
Tennessee v. Snead, 96 U. S., 69;
South Carolina v. Gaillard, 101 U. S., 433;
Antoni v. Greenhow, 107 U. S., 769;
Poindexter v. Greenhow, 114 U. S., 270.

With regard to this particular statute, the State courts have so held.

Nelson v. Bleckwenn, 19 N. Y. Supp., 993, 65 Hun, 621; affd., 137 N. Y., 565.

Complainant argues that, under the Long Island City Charter (chapter 461 of the Laws of 1871, title 6, section 23 [*ante*, pp. 3-4]), no property could be sold for less

than the amount of the assessment. But we see no warrant for such an assertion. Under the Charter, the property was not sold for cash or certificates; all sales were made "*for the shortest period for which any person will take the premises and pay the tax or assessment, interest, percentage and expenses.*"

This was no guarantee that the property could not be sold for less than the amount of the assessment because we find, in section 26 of the same title (*ante*, p. 4), that

"If, at any such sale, no bid shall be made for any parcel of land, the same shall be struck off to the city for the term of 100 years, and thereupon the city shall receive, in its corporate name, one of the certificates of the sale thereof, and shall be vested with the same rights as any other purchaser."

If this were done, how much would the owner have to pay the City to redeem? We do not understand that Long Island City would have to insist, in case of such a redemption, upon the payment of the full tax, interest, percentage and expenses (see sec. 12, *ante*, p. 4).

Nor do we understand that the complainant argues that section 26 of Title VI. of the Long Island City Charter applies to the sales for unpaid assessments prescribed by section 5 of chapter 326 of the Laws of 1874. If he does, it was clearly the duty of the person in charge of the sale, in case no bid were made for the property, to make such a disposition of it. But if a bid were made, which was lower than the amount of the assessment, interest, percentage, etc., what was the duty of the selling officer? The Long Island City Charter of 1871 seemed to make provision for only two things:

(a) a sale for the full amount of the tax or assessment, interest, etc.; and

(b) the case where no bid at all is received for the property.

Did this necessarily preclude a sale for less than the amount of the assessment? It may be that it did or it may be that it did not. That, however, is not the point. Referring to section 5 of the Act of 1874, complainant contends that he had a vested right to have such sales, as were made pursuant to that statute, conducted in the same manner as if they took place under the Charter of 1871. Now, let us assume that, under the Act of 1874, a piece of property were offered for sale and that no one bid for it: what disposition was to be made of it? Complainant will probably answer that it was the duty of the selling officer, no matter who he may have been, to strike it off to Long Island City for the term of 100 years (*ante*, p. 4). But assume that he did not; what was the complainant's remedy? If he were injured by that wrongful act, and Long Island City were responsible for the tortious acts of the selling officer, then, necessarily, he then had an action at law to recover any damages to which he may have been subjected; and, such being the case, he will not be permitted to invoke the aid of a Court of Equity because he then had an adequate remedy at law.

According to our way of thinking, section 4 of chapter 656 of the Laws of 1886 is simply a declaratory act and it crystallized into statutory form what had previously been the universal custom, on the part of selling officers who were vested with the power to sell, to auction the property to the highest bidder, for the best value it would bring. That is the only sensible way of viewing the situation. If the property to be sold would not realize the amount of the assessment, and interest was being constantly added to the debt, what was the use of holding

on to the property? Even on the assumption that it would increase more or less in value as time passed, we must not forget that the interest and the carrying charges were also being constantly augmented.

Unless, therefore, it can be established that Bleckwenn were guilty of bad faith, or at least constructive fraud, his actions, irrespective of the question of who is responsible for them, are not the subject of judicial criticism. He acted in accordance with the decisions of the courts of the State of New York and he was protected by his process.

Mechem's Public Office and Officers, sec. 661; Throop, Public Officers, secs. 756, 759-771.

Now let us assume, for the purposes of this discussion, that Long Island City were the trustee of an *express* trust and that Bleckwenn were its agent. What was its duty? To quote the language of Judge COLLIN, in

Costello v. Costello, 209 N. Y., 251, 261:

"trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent men of discretion and intelligence, in like matters, employ in their own affairs. The law does not hold a trustee, acting in accord with such rule, responsible for errors in judgment."

Would not the trustee of an *express* trust be acting "in good faith," and employing "such vigilance * * * as, in general, prudent men * * * employ in their own affairs," if he obeyed the laws of the State of New York, in administering his trust, as those laws had been construed by the courts of the State of New York? And would he not be bound by the adjudications, which had

been made, in the actions and proceedings which had been brought against his agent and representative, to obtain judicial constructions of the statutes which regulated and defined his powers and duties? It is a source of considerable regret that those final orders and judgments were not offered in evidence and made a part of the present record. It requires but a little reflection to know that they would have been *res adjudicata* in the present suit.

Ashton v. City of Rochester, 133 N. Y., 187; 23 Cyc., 1269, 1270.

VI.

The construction which the State Courts give to local statutes, especially when they prescribe or regulate the powers or duties of state or local officers, or when they involve property rights, excepting when grave constitutional questions are involved, are invariably followed by the Federal Courts.

Supervisors v. United States, 18 Wall., 71, 81;
Norton v. Shelby County, 118 U. S., 425, 440;
Stewart v. Kansas City, 239 U. S., 14;
Heim v. McCall, 239 U. S., 175, 189;
O'Brien v. Wheelock, 95 Fed., 883;
Board of Comrs. v. Union Bank, 96 Fed., 293.

If, in the present instance, that construction is not followed, let us see where The City of New York and its taxpayers stand. In doing what he did, of which the

appellant now complains, Bleckwenn, the Treasurer and Receiver of Taxes of Long Island City, acted according to the orders of the courts of the State of New York, which construed the statutes which are now the subject of controversy, and those courts sustained their validity. If Bleckwenn's acts are now held to be *ultra vires*, and Long Island City and The City of New York are responsible for them, what security has any public officer, or any municipality which obeys the orders of a court of competent jurisdiction, if it be subsequently adjudicated by the Federal courts that the State Court, giving the orders or instructions, acted erroneously?

It must be that, under such circumstances, the rulings of the State, will be followed by the Federal courts; else there will be a conflict between the two tribunals. In the State courts it will be held that Bleckwenn and those, if any, who are responsible for his acts, are free from liability; in the Federal courts, on the other hand, if the rulings of the State courts are to be disregarded and not followed, Bleckwenn may be held guilty of such tortious acts as will impose a liability upon those who are answerable for his conduct. Such, however, is not and cannot be the law. Counsel for the defendant, in

Amey v. The Mayor, Aldermen and Citizens of Alleghany City, 24 How., 364,

urged that the State statute, under which certain bonds were issued, was unconstitutional. He was thus answered (p. 375) by Mr. Justice WAYNE:

"Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the acts upon which the sub-

scriptions were made to the Ohio and Pennsylvania Railroad Company; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its Supreme Court, that acts for the same purposes as those are, which we have been considering, were constitutional."

To quote Mr. Justice STRONG, in

Supervisors v. United States, 18 Wall., 71, 81-82:

"That the construction of the statutes of a State by its highest courts, is to be regarded as determining their meaning and generally as binding upon United States courts, cannot be questioned. It has been asserted by us too often to admit of further debate. We have even held that, when the construction of a State law has been settled by a series of decisions of the highest State court, differently from that given to the statute by an early decision of this court, the construction given by the State courts will be adopted by us. And we adopt the construction of a State statute, settled in the courts of the State, though it may not accord with our opinion. **There is every reason for this in the consideration of statutes defining the duties of State officers.** It is true, that, when we have been called upon to consider contracts resting upon State statutes, contracts valid at the time when they were made, according to the decisions of the highest courts of the State, contracts entered into on the faith of those decisions, we have declined to follow later State court decisions declaring their invalidity. But, in other cases, we have held ourselves bound to accept the construction given by the courts of the state to their own statutes."

An illustration of this doctrine will be found in

Town of Queensbury v. Culver, 19 Wall., 83,

which involved the question whether a certain enabling act, passed by the Legislature of the State of New York,

violated any of the provisions of the Constitution of that State. Mr. Justice STRONG (at p. 91) said:

"If the Court of Appeals of New York had decided otherwise, we should feel constrained to follow its decision, but no such determination has been made."

Mr. Justice HUNT expressed the same idea in

Chambers County v. Clews, 21 Wall., 317, 324, when he declared that

"The constitutionality of the act of the Legislature, authorizing the issuing of these bonds, has been examined by the Supreme Court of Alabama, and the act has been held to be valid. These decisions are binding upon us, and we see no occasion to controvert them."

Similarly, in

Township of Elmwood v. Marcy, 92 U. S., 289, 294,

it was stated by Mr. Justice DAVIS:

"We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren, who agree to this opinion, might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the Constitution of Illinois. We have always followed the highest courts of the State in its construction of its own constitution and laws. It is only where they have been construed differently, at dif-

ferent times, that, in cases like this, we have adopted as a rule of action the first decision, and rejected the last."

Another case, also involving the validity of the bond issue of a county, is

County of Leavenworth v. Barnes, 94 U. S., 70, 71.

A similar ruling was made. Writing for the Court, Mr. Justice HUNT remarked:

"The recent decision upon this identical statute by the Supreme Court of Kansas, in a suit against this county, relieves us from all embarrassment upon this question. It gives effect and construction to one of its own statutes, and, according to well settled rules, will be followed by this court. The question is discussed at much length, many local authorities in support of their conclusions are cited, and the act is held to have been legally passed and to be a binding act. We must hold in accordance with this decision."

Following the ruling in *Township of Elmwood v. Marcy* (*supra*), it was asserted by Mr. Justice HUNT, in

Township of East Oakland v. Skinner, 94 U. S., 255, 257,

that

"If the Supreme Court of a State gives construction to the language of a statute, and there have been no conflicting decisions, this court, as a general rule, follows the construction thus given. *Township of Elmwood v. Marcy*, 92 U. S., 289."

In

County of Cass v. Johnston, 95 U. S., 360,

the Supreme Court had under consideration the con-

stitutionality of a statute of the State of Missouri which authorized a subscription, by a township, to the corporate stock of railway companies. After reviewing the decisions of the Supreme Court of that State, Mr. Chief Justice WAITE (at p. 369) said:

"We conclude, therefore, that the Supreme Court of Missouri, when it decided the case of *The State v. Linn County*, and held the law in question to be constitutional, did not overlook the objection which is now made, but considered it settled by previous adjudication. The case is, therefore, to be considered as conclusive upon this question, as well as upon that which was directly considered and decided, and, as a rule of State statutory and constitutional construction, is binding upon us. It follows that our decision in *Harshman v. Bates County*, in so far as it declares the law to be unconstitutional, must be overruled."

Again, in

Fairfield v. County of Gallatin, 100 U. S., 47, 51, it was said that:

"It thus appears to have become a rule of property in the State that municipal bonds, issued to railroad companies on account of donations given by the people before the adoption of the Constitution, are valid, though not issued until after the adoption. Such was the earliest exposition of the Constitution, made by the court of last resort in the State, twice since recognized by it, and recognized also by repeated legislative action. There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought and sold in the markets of the country."

Many other cases might be cited, but sufficient are given

to illustrate our contention and sustain our proposition.

The decisions of the State courts, to which we refer, ran from February 12, 1890, when the *Ryan* case (8 N. Y. Supp., 638; *ante*, p. 9) was decided, to February 10, 1893, when the *Nelson* case (137 N. Y., 565; *ante*, p. 13) was decided. Complainant's principal grievance seems to be the tax sale of 1892, which took place after all of these cases, with the exception of *Nelson v. Bleckwenn*, were decided. We come squarely, therefore, within the rule declared in the cases cited (*ante*, pp. 39-43). As was said by Mr. Chief Justice WAITE, in

Weightman v. Clark, 103 U. S., 256, 260:

“As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which, in our opinion, were lawfully made, that we disregard them.”

VII.

The Improvement Commissioners, who were appointed pursuant to chapter 765 of the Laws of 1871 (as amended by chapter 859 of the Laws of 1872 and chapter 326 of the Laws of 1874), and those who were authorized, by those enactments, to assist them, either in the performance of their duties or in carrying out the provisions of those statutes, were independent public officers and were not the servants or agents of Long Island City; and neither that municipality nor its successor, The City of New York, the present defendant, is responsible for any wrongful acts which they, or either of them, may have committed.

We quote from

Dillon on Municipal Corporations (5th Ed.),
vol. II, sec. 893, p. 1389:

"If, however, the bonds do not purport to be the promise of the municipality, but are issued by certain persons or officers or commissioners designated by statute to make the improvement, and are expressly stated to be issued pursuant to the statute for the purpose of the improvement, payable only from the assessment therefor, without liability on the part of the municipality, *such bonds, not being in form the obligation of the municipality, were regarded as simply the statutory promise or obligation of the commissioners or agents selected by the State to make the particular improvement, and no action in such case was held to lie against the municipality in respect of the bonds, even if it be only*

to enforce the creation of the funds. If the bonds express upon their face that they are issued pursuant to statute and are payable by virtue thereof only from the proceeds of the special fund created by an assessment or otherwise, there is no liability upon the City to pay the bonds out of the general funds or by virtue of its general power of taxation."

It is conceded by the complainant that no "primary obligation to pay the certificates existed on the part of Long Island City" (Brief, pp. 78). If no contractual obligation existed, on what is the alleged *express* trust relationship founded? Necessarily, if at all, on the statute of 1874. Referring to this subject matter, Judge DILLON, in the same sections, says:

"Under special improvement bonds the municipality was held to be a **statutory trustee** for collection, bound to the exercise of due diligence to collect according to law, enforcing the same through municipal machinery as an agent of the owners of the bond and answerable for failure to perform this duty, or not paying over, or failing to pay the money collected."

In support of this proposition Judge DILLON cites *New Orleans v. Warner* (175 U. S., 120); *Jewell v. City of Superior* (135 Fed., 19, 22), and *Olmstead v. City of Superior* (155 Fed., 172, 178). An examination of these cases will disclose that the reasons why the municipalities were held to be statutory trustee—not the trustees of an express trust, as the complainant contends—were that the statutes, authorizing the issuance of the bonds, imposed certain specified duties and obligations upon the municipalities, such as, for example, with regard to the collection of the assessments and the establishment of sinking funds for the redemption of the outstanding bonds; or, as in *New Orleans v. Warner* (*supra*), that the

municipality voluntarily assumed the obligations of a trustee. These cases do not aid the complainant; they rather militate against his contentions.

As pointed out by Judge DILLON, the cases cited hold that, even if it be a *statutory* trustee, the municipality is not a guarantor of collection and that, unless there be a failure of duty, there is no liability for non-collection.

Necessarily, it follows, it seems to us, if the municipality be liable for negligence, that the remedy is a common law action to recover the damages sustained, because of the alleged negligence, and not a suit in equity to compel the alleged trustee of an *express* trust to account for trust funds which never came into its possession and which, it is claimed, were lost because of its agent's failure or neglect to collect them.

VIII.

We come now to the important question, whether Bleckwenn, in acting under the statute of 1874, were an agent either of the Improvement Commissioners or of Long Island City, or whether he were an independent public officer, vested with certain statutory powers which, but for the Act of 1874, he would not have possessed.

If he were acting as the agent either of the Improvement Commissioners or as an independent public officer, necessarily Long Island City was not and could not be made liable for his wrongful acts. We have only to concern ourselves, therefore, with the question, whether he were acting as an agent of Long Island City; because, if

he were not, it will be unnecessary to further consider the subject.

The bill (p. 8) alleges

"that said Commissioners, Assessors and City Treasurer and Receiver of Taxes were local officers and agents of and for Long Island City, in performing all the matters and things in said Act of 1874 provided for, intended to be and actually employed under said Act of the Legislature in the conduct of local improvements. * * *"

This conclusion is based upon certain excerpts from chapter 765 of the Laws of 1871, to the effect

(a) that

"it shall be lawful for the other Commissioners, as often as such event or vacancy shall happen, to appoint a suitable person to fill such vacancy, and such appointee shall have all the power and authority vested in a Commissioner by this act" (sec. 1);

(b) that such Commissioners

"shall severally take and subscribe an oath before the Mayor or Recorder of Long Island City * * * and shall report from time to time, when called upon to do so by the Common Council, their acts and doings in the premises" (sec. 6);

(c) that

"The Mayor and Common Council of Long Island City shall provide, by special tax or otherwise, such sum or sums of money as, in their judgment, shall be necessary to defray the expenses * * * but no draft shall be paid until a true account of such expenses, in detail, shall have been first rendered to the Mayor and Common Council of said City, verified by the oaths of said Commissioners, and passed upon and approved by the said Mayor and Common Council * * *" (sec. 7);

(d) that

"The Commissioners appointed under this act shall keep a record of their acts and proceedings, which record shall be filed on the completion of their terms of office, in the Clerk's Office in said City" (sec. 12);

(e) that

"The said Commissioners shall each receive the sum of \$3,000 a year, and at that rate while they shall, respectively, be actually employed in the duties assigned to them, the same to be paid by the Mayor and Common Council of Long Island City, out of the moneys provided for the expenses of such commissioner."

These considerations, as the authorities hold, do not and cannot affect the status of Bleckwenn under the Act of 1874.

(a) **The circumstance that a person, who performs an act, by virtue of an independent statute, is an officer of a municipality, does not make the municipality responsible for his conduct in the performance of that particular duty.**

"The fact that the officer in question is appointed by the municipal authorities or elected by the electors thereof, and is paid by the city, is not conclusive of the capacity in which he acts with reference to the liability of the city for his torts. The city may yet be exonerated if, in the particular act in question, the officer or agent acted as the representative of the state and its sovereignty, rather than as the agent or representative of the municipality."

20 Am. & Eng. Encyc. of Law (2d Ed.), 1203.

A leading case on this subject is

Liebman v. San Francisco, 24 Fed. Rep., 705,

where the following facts appear:

The Act of April 1, 1872, of the Legislature of California, had for its object the opening of a public street in the City of San Francisco. All costs incidental to the opening of the avenue were to be assessed upon the adjoining lands and the benefits were to be apportioned by a Board of Public Works created for that purpose. This board consisted of the Mayor, the Tax Collector and the Surveyor of the City and County of San Francisco. The board was required to issue bonds designated, "*Montgomery Avenue Bonds*," which were to be signed by all the members of the board. The plaintiff brought an action against the City and County to compel the payment of twenty coupons attached to these bonds. At page 711, FIELD, J., wrote as follows:

"But the fact which disposes of this question of recitals, and any alleged effect attributed to them in the present case, is that the *so-called bonds*, to which the coupons in controversy were attached, are not obligations of the city and county. They are not executed by it, or under its seal, or by its agents or officers, but by certain parties constituting the board of public works. The fact that certain officers of the city and county are made members of the board to appraise the property taken, and the injuries and benefits caused by the opening of the avenue, and to issue the bonds, does not constitute them agents of the city and county, and render their work as such board, or the bonds issued by them, the work or the bonds of the city and county; no more than if they were constituted a board to establish a university, and prescribe the studies to be pursued in it, would make them the agents of the municipality for that purpose. Agents can only exercise the

powers of their principals; they cannot lawfully exceed them. Here the city and county, as a municipality, is not authorized to open the avenue, to appraise the value of the property taken, or the amount of injuries received by or benefits conferred upon the owners of property along the line of the avenue, or to sign and issue its bonds to the parties injured. In all these matters the board acts independently of the municipality. It is made the agent of the state to carry out a public improvement directed by its statute, and not the agent of the city and county. This branch of the case is more fully considered by my associate, and I fully concur in his views."

A similar ruling was made in the leading case of *Meath v. Phillips County*, 108 U. S., 553.

See, also,

28 Cyc., 1257-1264, 1269-1280;
 Dillon on Munic. Corps. (5th ed.), vol. II, sec. 893; vol. IV, sec. 1655;
 Jones, Negligence of Municipal Corporations, sec. 163;
 Williams, Municipal Liability for Torts, sec. 16.

(b) The circumstance that certain duties, imposed by an independent statute, upon certain specified municipal officers, might have been delegated to the municipality itself, has nothing to do with the question, whether the persons performing the duties, under the independent statute, act as agents of the municipality.

Thus the State may appoint some independent board or officer to perform duties which it might have imposed upon a municipality. Such independent officers may even be officers of the municipality. But, if they are not acting

on behalf of the municipality, the latter is not responsible. A leading case on this subject is

People ex rel. Commissioners, etc., v. Supervisors of Oneida, 170 N. Y., 105.

It was there held that chapter 89 of the Laws of 1901, appointing specified residents of the County of Oneida a board of commissioners to erect a court house in the City of Utica, was not a violation of the State Constitution, providing for the election or appointment of county officers, or relating to local legislative powers, since the Legislature has power to appoint persons to carry out a local improvement, who are not thereby constituted county officers, but become the agents of the State, although the power to make such improvements is, at that time, vested in the local authorities elected by the people. Writing for the Court (at p. 108), Judge HAIGHT said:

"The power to construct these buildings may be delegated to the cities or the counties in the State, or it may be done through such agents of the State as the Legislature shall provide. In this case the Legislature has seen fit, through the act in question, to relieve the Board of Supervisors of Oneida County temporarily of the duty of constructing the court house and has cast that duty upon a number of persons who are named as commissioners, *who become the agents of the State.*"

To quote Judge RAPALLO, in

People ex rel. Kilmer v. McDonald, 69 N. Y., 362, 365:

"These commissioners (who were appointed for the purpose of widening a designated highway) do not take the place of the commissioners of highways, but are appointed for the special purpose of execut-

ing a power, which is undoubtedly possessed by the Legislature, of widening a certain designated avenue by proceedings different from those which could be taken by the commissioners of highways under the existing general laws of the State."

And in

Sander v. State of New York, 182 N. Y., 400, 404,
Chief Judge CULLEN said:

"So, in the case before us, while it is doubtless true that the Legislature might have imposed upon the city the duty of making the Park avenue improvement, as a matter of fact it did not, but imposed the duty upon a specially created board of officers or commissioners who were not agents of the city and for whose acts the city was not liable."

(c) **A municipal corporation is only liable for the acts of its officers and agents when performing duties in its behalf, which are imposed upon the principal.**

This obviously fair rule has been either forgotten or disregarded by the complainant in his attempt to fasten a liability upon Long Island City or The City of New York for the acts of officers who did not act as its agents. The courts, however, have been astute in protecting taxpayers from such unfair claims. The carelessness of the complainant, in entering into a contract which, as he now maintains, is unfavorable to him, because the other contracting party is financially irresponsible, is surely no justification for the commencement of the present suit against The City of New York, which is a perfectly innocent party. In

New York & Brooklyn Saw Mill & L. Co. v. City of Brooklyn, 71 N. Y., 580, 584,

it was said by Chief Judge CHURCH:

"It has been repeatedly held that a municipality is not liable for the acts or omissions of an officer in respect to a duty specifically imposed, which is not connected with his duties as agent of the corporation."

And, in the leading case of

Liebman v. City and County of San Francisco,
24 Fed., 705, 715,

where a number of the authorities are collated, it was said by Judge SAWYER, in a concurring opinion:

"The act, under which the instruments sued on purport to have been issued, is not an amendment of the city charter, and it does not purport to enlarge the powers or duties of the corporation, or of its officers, in their capacity as officers or agents of the corporation. It does not confer any authority whatever upon the corporation to do any act in its corporate capacity, or impose any duty or obligation upon the municipality relating to the opening and dedication to public use of Montgomery avenue. The corporation is not authorized to do the acts necessary to the opening and dedication of the street to the public use contemplated by the act, or required to see that the costs of the work, upon completion, shall be collected or paid; in short, the corporation, as such, is neither required nor authorized to perform any act in relation to the opening and dedication of the avenue, or in relation to payment therefor, when accomplished. Clearly, it seems to me, the State has undertaken to do this work through the instrumentalities chosen by itself, of which instrumentalities the corporation called the city and county of San Francisco is not one. Some of the officers of the city, it is true, are designated as instrumentalities for carrying out the scheme provided for; but, in carrying it out, they do not act by virtue of any

authority derived under the charter of the corporation, or any act amendatory of the charter, or enlarging its powers, or under the authority of the corporation, but they act solely by authority of the act in question, independently of any act of the corporation; their designation by their official titles being only *descriptio personarum*, to indicate the particular parties chosen for the work."

Referring to the same subject, in

Sander v. State of New York, 182 N. Y., 400, 404,

Chief Judge CULLEN remarked that

"* * * the statement of Judge VANN (in *Lewis v. New York & Harlem R. R. Co.*, 162 N. Y., 202), that the Park Avenue Board was a governmental agency of the State, was well justified both on principle and on authority. The liability on the part of a municipality, even for the acts of municipal officers, occurs only when the acts are done in the discharge of a duty or a function imposed upon the municipality as such."

(d) **The circumstance that a designated officer of a municipality, who acts under an independent statute, has no freedom of action, but is obliged to act as the State dictates, must also be taken into consideration in determining whether or not the officer acts as an agent on behalf of the municipality.**

In

Astoria Heights Land Co. v. City of New York,
89 App. Div., 512, 517; affd., 179 N. Y., 579,

the Referee's opinion, which was adopted by the Court, reads, in part, as follows:

"I agree with the learned counsel to the corporation that no liability was imposed upon Long Island

City by anything that was done under the Act of 1890, or by any failure of the Grand Avenue commissioners to complete the improvements which the act authorized and which they undertook to make. The work was not instituted by the city; the city had no control over it, nor over the commissioners to whom the entire direction and details of the work were committed by the statute; it was not to be done at the city's expense; but at the expense of the owners of land in the locality to be directly benefited; the commissioners were to provide moneys with which to make the improvements by the issuance of certificates of indebtedness which were not, and did not purport to be, obligations of the city; moneys received from the sale of such certificates did not become the moneys of the city; moneys received in payment of assessments did not become the moneys of the city, usable for city purposes, but constituted a special fund for the payment of the certificates to 'be kept separate and apart from all other moneys' and to be applied only to that single purpose. No power was granted to the city, and no duty laid upon it by the any provision of the act; therefore, the city could not be made liable for neglect or non-performance. *Conrad v. Trustees of Ithaca* (16 N. Y., 158), as I read it, is not an authority to the contrary."

(Note.—The statute which was there considered is very similar in its purpose and phraseology to the Act of 1874.)

Mr. Justice BREWER, in the famous case of

Peake v. New Orleans, 139 U. S., 342, 353,

must have had the present situation prophetically in mind when he wrote:

"If ever there was a case in which the responsibility of a city should be narrowed, this is one. By the legislation of the State, it was denuded of all

freedom of action. It had no choice of contractor or price. Neither the property to be taxed, nor the means or method of collecting the assessments, was intrusted to its discretion. This is not a case in which there was a failure on the part of the legislative body, the city council, to prescribe and provide sufficient machinery for the collection of assessments. No superintendence of the financial department, whether as to the property to be assessed, the amount of the assessment, or the collection thereof, was intrusted to the municipality. All this financial power was placed directly, by State action, without its consent, in one of its official boards. Thus denuded of freedom of action, it may properly insist upon the narrowest limits of responsibility. If the financial duty was devolved, without its consent, upon one of its administrative boards, and such board was derelict of duty, it may properly say to a complaining party, your remedy was mandamus, to compel prompt and efficient action by that board. In respect to a kindred question, the neglect of the city council, Judge DILLON pertinently asks, 'why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment and proceed in the collection thereof with the requisite diligence?' Section 482, 1 Dillon on Municipal Corporations, 4th ed."

(e) The circumstance that a municipality, in its private, as distinguished from its public capacity, does not obtain any peculiar benefit from a work which is to be performed under an independent statute, is also a factor to be considered in determining whether or not the officers, designated in the independent statute, who perform the work, are the agents of the municipality.

Thus, in

Tone v. The Mayor, etc., of New York, 70 N. Y., 157,

in discussing the question whether or not the members of the Board of Revision of Assessments were independent public officers, Judge EARLE said, at page 165:

"Their powers were defined by the Legislature, and were not what might properly be called corporate powers, and they were not to be exercised for the peculiar benefit of the corporation in its local or special interest, but for the public good, in obedience to the mandate of the Legislature."

And, see,

Astoria Heights Land Co. v. City of New York (supra).

In the present case, Long Island City did not derive any peculiar corporate benefit from the construction of additional streets. Assuming it to be true—a proposition, however, which has not been established—the increase in the value of the tax property is not such a benefit as would indicate that the construction of the streets was done for the financial profit of the municipality. See

Taggart v. Fall River, 170 Mass., 325, 327.

where it was said:

"Nor does the fact that the city would derive an incidental advantage or profit from an increase in the value of its land bring the case within an exception to the general rule. * * * The work upon it was, therefore, work for the public benefit. The increase of the value of the land in the neighborhood, in which benefit the city shared with other owners, does not change the character of the work or impose liability on the city, as showing that it was a work carried on as a business for profit."

These principles have been applied by the State courts

to a situation which is very similar to that presented by the case at bar. In

East River National Bank v. City of New York,
93 App. Div., 242,

the statute which was construed, while not identical with the one now under consideration, contains all of its essential elements. The principles, on which the Appellate Division decided the *East River National Bank* case, if correct, require a decision in favor of the defendant, The City of New York, in the case at bar. The headnote to the *East River Bank* case reads, in part, as follows:

"The act * * * committed the performance of the work to certain persons designated therein, who were styled '*the Flushing Avenue Improvement Commissioners.*'"

"The act provided that the cost of the improvement should, in the first instance, be met by certificates of indebtedness signed by the commissioners and countersigned by the treasurer and receiver of taxes of Long Island City; that such certificates of indebtedness should be paid out of assessments on the property benefited, which the commissioners were authorized to levy; that the assessments, which were made a lien upon the property assessed, should be paid to the treasurer and receiver of taxes of Long Island City; that if any assessment should remain unpaid for a period of eight years, the treasurer and receiver of taxes of Long Island City, 'or such other officers as shall then be authorized by law to sell lands situate in said city for non-payment of said city taxes,' should sell the property assessed in the same manner as though the sale were for unpaid city taxes; that the treasurer and receiver of taxes of Long Island City should keep all moneys received by him on account of the assessments in a general fund, and should use such funds for the sole purpose of paying the certificates of indebtedness; that he should be liable upon his official bond for the

faithful discharge of the duties imposed upon him by the act; that if there should be any excess to the credit of the improvement fund after the payment of the certificates of indebtedness, it should be paid into the city treasury and applied in reduction of the city taxes levied upon the property assessed.

"The statute contained no provision which, in express terms, made Long Island City liable for the payment of the certificates of indebtedness issued thereunder."

Writing for the Court, Justice INGRAHAM (at page 249) said:

"There is no provision of this act which, in express terms, makes the city liable for the payment of these certificates. The provision of section 8 (*supra*), directing the sale of the property, does not impose a duty upon the city to make such sale. It directs that such property, upon which an assessment or interest shall remain unpaid, after the expiration of eight years from the confirmation of the assessment and the filing of the assessment roll, or a certified copy thereof, as specified, shall be advertised and sold for the payment of such unpaid interest or assessment, or both, as the case may be; and such sale or sales was or were directed to be made by the treasurer and receiver of taxes of said city, or such other officer as should then be authorized by law to sell land situate in said city for the non-payment of city taxes. Here, again, the officer who is to make such sale is designated by the Legislature, and, in making such sale, he would act under this specific power given to him by the Legislature and not by virtue of any authority that he had as an officer of the city; and then, in case there should be any excess of the amount necessary to pay the certificates, the amount is not to be paid over to the city for its benefit, but is to be applied to the reduction of the payment of taxes upon property that had been assessed for the improvement by the legislative mandate (sec. 9,

supra). The sole duty that rested on any city official was that which was imposed by the act upon the officer, not as a corporate officer, but as a person designated by the act to perform the duties prescribed by the act."

There is no provision, in the Act of 1874, which makes Long Island City liable for the payment of these improvement certificates, nor does it impose any duty upon the City to make the sales. The officer, who was to make such sales, was designated by the Legislature, and he was not acting by virtue of any authority which he possessed as an officer of the City. In case there was any excess over the amount required to pay the certificates, it was not to be used for the City's benefit, but was to be applied to the reduction of the payment of taxes upon the assessed property.

It is respectfully submitted that, on the general principles enunciated in the above quoted cases, and on the direct authority of

East River National Bank v. City of New York
(*supra*),

the Treasurer of Long Island City, in making the assessment sales, was not acting as the agent of the City. It therefore follows that, whether his acts, in making such sales, were legal or not, Long Island City cannot be held liable.

IX.

While it may be true that, under a given set of circumstances, Long Island City may have been answerable for the wrongful acts of its Treasurer and Receiver of Taxes, it was not responsible for them in either of the following instances: (a) when that official was not acting on its behalf; (b) when, if representing the City, he performed an act or did something which was beyond the powers of the City and *ultra vires*; and (c) when his acts are *ultra vires* and beyond the powers conferred upon him.

Dillon, Municipal Corpsns. (5th ed.), Vol. IV., secs. 1647-1650.

See, also,

Lefrois v. County of Monroe, 161 N. Y., 563, 567;
Consolidated Ice Co. v. New York, 166 N. Y., 92, 102;

Matter of Reynolds, 202 N. Y., 430, 441.

To quote from the opinion of Judge SAWYER, in the *Liebman* case (24 Fed., at pages 718-719), which is amply supported by the authorities which he cites to sustain his proposition:

"These bonds were issued in connection with that portion of the work assumed by and carried on exclusively by the State, and under its direction, and with which the corporation had no concern. The board of public works, and other parties designated by the Montgomery Avenue act to perform the duties therein indicated, performed such duties solely by

virtue of that act. The duties were not performed by virtue of any authority of the municipal charter, or of any other act conferring power or authority upon the municipal corporation. The consent of the corporation was in no way obtained or asked. The acts were solely performed in pursuance of the express, direct command of the statute itself, wholly irrespective of the will or the charter powers of the corporation. They were not performed in the exercise of corporate powers, and they were in no sense corporate acts. The authorities are numerous establishing the proposition that parties, so acting by express direction of the statute, without the authority of the municipal corporation, and not acting by virtue of the powers conferred on the corporation by its charter, do not act as officers or agents of the corporation, and the corporation not being the principal, their acts are not the acts of the corporation; they are but the agencies employed by the directing power for the accomplishment of its own purposes.

"The following are some of the authorities establishing this self-evident proposition, and it will be sufficient to cite the cases, without analyzing or commenting upon them in detail: *Sheboygan Co. v. Parker*, 3 Wall., 96; *Horton v. Town of Thompson*, 71 N. Y., 521; *Board Park Commrs. v. Detroit*, 28 Mich., 244, 245; *People v. Chicago*, 51 Ill., 17; *Hoagland v. Sacramento*, 52 Cal., 149; *Tone v. Mayor*, 70 N. Y., 165; *New York & B. S. M. & L. Co. v. Brooklyn*, 71 N. Y., 584. In *Horton v. Town of Thompson* (*supra*), the Court said:

"In the present case no action on the part of the town in its corporate capacity, or on the part of any of its officers, was required by the act, or was taken. The money was to be borrowed, and the bonds issued by commissioners to be appointed in the manner prescribed by the law. These commissioners were in no sense town officers, nor did they represent the town' (page 521)."

See, also:

- Scott v. City of Tampa*, 62 Fla., 295, 42 L. R. A. (N. S.), 908, note;
- Edson v. City of Olathe*, 81 Kan., 328, 36 L. R. A. (N. S.), 861;
- 72 Am. Dec., 180, 182, 186;
- 63 Am. St. Rep., 187, 189;
- 28 Cyc., 1271;
- Jones, Negligence of Municipal Corpsns., secs. 163-166);
- Mechem, Public Office, sec. 850;
- Williams, Municipal Liability for Torts, secs. 14-22.

X.

There are very few exceptions to the general rule that a municipal corporation, in collecting taxes and assessments, and in foreclosing liens for the same, and in selling the properties, acts in its governmental capacity, as an agent of the State, and that it is not liable for the acts of the officers who perform those functions.

- Lorillard v. Town of Munroe*, 11 N. Y., 392;
- Heiser v. Mayor, etc., of New York*, 104 N. Y., 68;
- Morse v. Lowell*, 7 Metc. (Mass.), 152;
- 28 Cyc., 1271;
- Dillon, Municipal Corpsns. (5th ed.), vol. IV,
- secs. 1652-1653;
- Mechem, Public Office and Officers, sec. 852;
- Williams, Municipal Liability for Tort, sec. 23.

XI.

Neither an express trust nor a power in trust, nor any duty or obligation, in the nature of a trust, was imposed, by the Act of 1874, upon Long Island City.

Two classes of trusts are generally recognized, express trusts and implied or constructive trusts. Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will; or by words, either expressly or impliedly, evincing an intention to create a trust.

39 Cyc., 24, and cases cited.

In the State of New York, "there are four essential elements of a valid trust of personal property: (1) A designated beneficiary; (2) designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee, and (4) the actual delivery of that fund or other property or of a legal assignment thereto to the trustee with the intention of passing legal title thereto to him as trustee (*Martin v. Funk*, 75 N. Y., 134; *Watson v. Abbey*, 70 Hun, 475; *Greene v. Greene*, 125 N. Y., 506; *Young v. Young*, 80 id., 422; *Sullivan v. Sullivan*, 161 id., 554)."

Brown v. Spohr, 87 App. Div., 522, 529; affd. 180 N. Y., 201.

Implied trusts, properly speaking, are such only as arise by operation of law, as contradistinguished from such as arise by properly executed agreements of the parties. They are raised by law for the purpose of carrying out the presumed intention of the parties, or, with-

out regard to such intention, for the purpose of asserting equitable rights of parties or frustrating fraud, and include the two classes of trusts known generally as resulting and constructive trusts.

Adam's Eq. (5th Am. ed.), 27;
Bispham's Eq. (4th ed.), 118;
1 Pomeroy's Eq. Jur. (2d ed.), sec. 155;
2 Story's Eq. Jur. (13th ed), sec. 980.

There is an obvious difference between an *express* trust, which is created by the *voluntary* acts of the parties to the trust agreement, and the performance of a public duty imposed by law upon a public officer. The distinction was noted, and commented upon by the Court

In re New Statehouse, 20 R. I., 17, 37 Atl., 2, 4,
from which we quote the following:

"The question whether statehouse commissioners are 'trustees,' in the legal sense of the word, must be answered in the negative. They are interested with the disposition of a fund which is devoted by law to certain purposes, which we have said is analogous to a trust fund; but so are other officials who could not be called trustees. The governor, for instance, has at his disposal a certain fund, which he may expend, in his discretion, for the apprehension of criminals. This does not make him a trustee, and subject his administration of the funds to a supervision of a court of equity. In the case of a real trust, if the trustee is guilty of misconduct he may be summoned to account, at the word of the beneficiary; and he may be removed and a successor may be appointed, or the Court may direct him to administer the fund, or assume the disposition of it through a receiver or a master in chancery. Those commissioners are officials of the state, agents of the government assembly, and accountable to the legisla-

ture for their official acts. If public office is a public trust it is so in a moral sense, not in legal intentment."

Let the complainant answer this question: Would a Court of Equity be empowered to remove the Treasurer and Receiver of Taxes of Long Island City, who had been designated by the Legislature, to administer this alleged trust, and appoint another trustee in his place?

Moreover, as the authorities indicate, an *express* trust is a *voluntary* trust and it is founded, to a more or less extent, upon the personal relationship, upon the confidence or trust reposed by one person in another. A *constructive* trust, on the other hand, is an *involuntary* trust.

39 Cyc., 28.

Having in mind these definitions, illustrated, as they are, by numerous rulings of the courts, we must confess our inability to appreciate Point II of Appellant's Brief (page 77). Long Island City, in the first place, was not authorized to levy any assessments for this improvement. That power was lodged in independent public officers. In the second place, it was not empowered to collect any assessments. That duty was entrusted to independent public officers. It was given no authority, in the third place, to foreclose the liens of the assessments by selling the properties. Independent public officers were vested with authority to perform that duty. No certificates, in the fourth place, were issued by it. Concededly, that was done by independent public officers. Those certificates, it is admitted, were not the obligations of Long Island City. With regard to either the creation or maintenance of a redemption fund, no obligation, in the fifth place, was imposed upon Long Island City.

How, under the circumstances, it can be claimed that

Long Island City was the trustee of an *express* trust, created by chapter 326 of the Laws of 1874, for the benefit of the certificate holders, is something which passes our comprehension.

The distinctions, between an *express*, and an *implied* trust, must be carefully kept in mind, because many, if not all, of the authorities which the complainant cites, in his effort to show that the statute of limitations does not apply, and that laches should not be imputed to him, are cases of *express* trusts.

In determining what trusts are exempt from the statute of limitations, the term "trust" is not to be given its general or popular meaning, but must be construed according to its technical signification, so as not to include anything but actual trusts. It is not every case of direct and express trust, arising between trustee and *cestui que trust*, which is exempt from the operation of the statute. The only class of trusts not affected by the statute are, in the language of Chancellor Kent (*Kane v. Bloodgood*, 7 Johns. Ch., 90), "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction" of courts of equity. Therefore, whenever there is an adequate, concurrent remedy at law, the statute will apply, although relief be sought in equity; and the statute will run from the time the cause of action first accrues. This is in accordance with the general rule that the statute of limitations applies in equity whenever there is a concurrent remedy at law.

25 Cyc., 1152-1154.

See, also,

Talmage v. Russell, 74 App. Div., 7, 13-14;
Eddy v. City and County of San Francisco, 162 Fed., 441, 445.

"To prevent the application of the statute in favor of a trustee the trust must be created by the direct act of the parties, and, when a person is charged as trustee by implication or constructive trust of law, he may claim the protection and benefit of the statute. It is only when there is an actual, continuing and subsisting trust that the trustee is precluded from setting up the statute of limitations."

Wood v. Board of Supervisors, 50 Hun, 1, 13;
Strough v. Board of Supervisors, 119 N. Y., 212, 220;

City of Centerville v. Turner County, 25 S. D., 300, 126 N. W. Rep., 605, 608.

XII.

We may admit, for the purposes of this discussion, although we do not appreciate its materiality, that the redemption fund, which was contemplated by the Act of 1874, was in the nature of a statutory trust.

But who was to administer the trust? To say that Long Island City was the trustee simply and solely because Bleekwenn, who, at that time, happened to be its Treasurer and Receiver of Taxes, was authorized, by that statute, to do certain things, not for the benefit of the City, but for the benefit of the certificate holders and the abutting property owners, borders on the ridiculous.

In this connection, we do not, as the appellant suggests, intend to impute to the Legislature a design to perpetuate a fraud. Statutes of this character are not new nor are they uncommon. The concern, which did the work of the improvement, knew, before it bid for the job, how it was to be paid, and, with that knowledge,

it made its contract. Those who advanced money to it and speculated with the improvement certificates undoubtedly knew what they could or might expect. It is a matter of common knowledge that, prior to 1898, Long Island City was in a deplorable financial condition. It was practically bankrupt. It was an impoverished, tax-ridden community. And the evident purpose of the Legislature, in passing the Act of 1874, was to prevent the representatives of Long Island City from having anything to do with the subject matter of the improvement.

Complainant is in no worse position than the holder of any mortgage bond. If, when a mortgage is foreclosed, the amount of the mortgage is not realized, the bondholders must necessarily suffer some loss. It is the same way with any one who loans moneys and is secured by collateral. If the security depreciates, and the debtor fails to make good, the lender necessarily loses. So why, in this instance, impute bad faith to the Legislature? Is the situation any different from any other case in which mortgagees or bondholders do not realize all of their investments?

XIII.

If, as the complainant contends, Long Island City were the trustee of an express trust, then we maintain that the Legislature could not have intended, by the passage of the Greater New York Charter (Laws of 1897, Chap. 378, Sec. 4), to remove the trustee and to substitute and appoint the present defendant in its place and stead.

In the State of New York, the appointment of a substituted trustee is the exercise of a judicial, and not the exercise of a legislative power. The substitution of the present defendant, therefore, as a trustee, to be legal, should have been made by the Supreme Court and not by the Legislature.

Before the enactment of the Revised Statutes of the State of New York, the jurisdiction of the Court of Chancery extended to both the removal and the appointment of new trustees.

People v. Norton, 9 N. Y., 176, 178.

And it has been held, that that jurisdiction existed independently of statute.

May v. May, 167 U. S., 310, 320;
People v. Norton, 9 N. Y., 176;
Disbrow v. Disbrow, 46 App. Div., 111, 114;
Story, Equity Juris. (13th ed.), vol. 2, secs. 1287,
 1289.

In this respect, the Revised Statutes did not confer a new judicial power; they declared the pre-existing law.

Wood v. Brown, 34 N. Y., 337, 341;

Matter of Mechanics Bank, 2 Barb., 446, 449.

Subsequently, under the State Constitution of 1846, the Supreme Court was vested with the jurisdiction in equity which was formerly exercised by the chancellors.

Laws of 1847, chap. 280;

Gardner v. Ogden, 22 N. Y., 327, 332.

We do not dispute the right of the Legislature to saddle the debts and obligations of Long Island City upon the present defendant; but we do deny its power to remove the trustee of an *express* trust, without a hearing, and to substitute a new trustee in its place and stead.

These considerations make it very clear, we think, that by the passage of the Act of 1874, the Legislature did not, and could not have intended to make Long Island City the trustee of an *express* trust.

XIV.

Complainant failed to establish a cause of action.

According to his own theory, the only alleged breach of trust which caused him any damage, consisted in foreclosing the liens of the assessments and selling the properties for less than the amounts of the assessments. But how could that have been avoided or what else, under the circumstances, could have been done? This record is destitute of proof that, at the time these sales were

made, the properties, which were sold, possessed any greater value than the amounts which were bid for them. It may be that they were too heavily assessed and could not stand the burdens.

Now let us assume that, instead of the properties being sold, they had been knocked down to Long Island City; how would that have helped matters? What assurance have we that Long Island City would have been able to obtain any larger bids for the properties? But what is more important still, if a trust relationship existed, how could the trustee be permitted to bid in the property?

See

15 Am. & Eng. Ency. Law (2d ed.), p. 1197.

XV.

The cases cited by the complainant, to support the proposition that, "where a fund or specific property is directed to be collected and set apart and applied to a specific purpose, equity raises, by implication, an express trust to effectuate the intended object," do not do so; they are either clearly distinguishable or not in point.

Brief, page 99.

At the outset, we would like to inquire, if, as is generally supposed, equity follows the law, how equity can imply something which is forbidden by the laws of the State?

(1) The head note in

Vickery v. City of Sioux City, 104 Fed., 164,
is as follows:

"Acts 20th Gen. Assem. Iowa, chap. 20, §1, declares that cities may improve streets, etc., and assess the cost on abutting property, and provides that such assessment shall constitute a sinking fund for the payment of the improvement of the street on which the property abuts, 'and should be used and appropriated for no other purpose,' and, to provide for defraying the cost of such improvements, in the first instance, *the city may issue bonds*, all of which shall express on their face the name of the street to defray the cost of which they were issued, and that the proceeds of such bonds shall be used for no other purpose than the payment of the cost of improving the particular street therein named.

Held, that a city having issued such bonds, was charged, as a trustee, with the duty of collecting and applying thereon the assessments on the property abutting on the particular street therein named.

SHIRAS, District Judge (at p. 166), said:

"It cannot be well questioned that the bonds sued on contain an absolute promise *on behalf of the city* to pay the amounts thereof to the payee or bearer, and therefore it is true that in an action at law the holders of the bonds could recover judgment for the sums due thereon against the city. It is equally true that, under the provisions of the act of the general assembly authorizing the issuance of the bonds, the city assumed the duty of creating and properly applying the sinking fund provided for in the act, and to that end was charged with the duty of levying the special assessments called for by the act, collecting the same, and making proper payment there-

of to the bond-holders. In these particulars the city is charged with a duty *amounting to a trust.*"

There is, as we have pointed out, a manifest difference between an "*express trust*" and "*a duty amounting to a trust,*" or in the nature of a trust.

(2) *New Orleans v. Warner*, 175 U. S., 120,

as a reference to the headnotes will disclose, has no bearing on the present litigation. It there appears that "The city of New Orleans, *having voluntarily assumed the obligations of a trustee*, with respect to the fund to be raised by the collection of drainage assessments," was estopped from setting up the prescription contained in Article 3547 of the Civil Code of Louisiana, to the effect that "all judgments for money * * * shall be prescribed by the lapse of ten years * * *."

(3) In

Jewell v. City of Superior, 135 Fed., 19,

it appears (p. 20) that "In the year 1891, pursuant to the authority of chapter 16 of its charter, *the City of Superior issued its bonds*, from the sale of which money was derived to pay the cost of the improvements."

The holding was not that the municipality was the "*trustee of an express trust*," but that it was a "*statutory trustee*," i. e., that the statute imposed certain duties and obligations upon it which it was obliged to fulfill.

(4) In

City of Galena v. Amy, 5 Wall., 705,

it appeared that "*the city issued a large amount of bonds* to enable it to make various public improve-

ments." Interest on the bonds became due and remained unpaid. Thereupon, a suit was brought against the city and a judgment was recovered. For the reason that the judgment was not paid, Amy, the judgment creditor, commenced a mandamus proceeding to compel the municipal authorities to levy a tax to pay the judgment. And it was held that that was the proper procedure to enforce the collection of the debt.

(5) In

Mather v. City and County of San Francisco,
115 Fed., 37,

the act of the Legislature of California, which was before the Court, and which authorized the board of supervisors of the city and county of San Francisco, in its discretion, to issue an order for the widening of Dupont Street, provided that, in case the street should be so widened, all damages, costs, and expenses thereof should be paid by "*bonds of the city and county of San Francisco,*" and that for the payment of the interest and principal of such bonds there should be levied a tax upon the lands found to be benefited by the improvement.

Nor does this case hold that the municipality was the trustee of an *express* trust.

(a) Neither do the cases, cited to support the proposition, that "the trust to collect and administer the fund * * * was imposed * * * upon Long Island City in its corporate capacity," sustain it.

Brief, p. 111.

(1) The inapplicability of such cases as

Sage v. City of Brooklyn, 89 N. Y., 189,

cited on pages 113 and 184, is so well pointed out by Judge SAWYER, in *Liebman v. San Francisco* (24 Fed. 705, 719), that it would be a work of supererogation to do more than to quote from his opinion. It follows:

"The strongest case cited in opposition to the views expressed, and to support the position that the opening of Montgomery Avenue was a municipal and not a state undertaking, for which the municipal corporation is liable, is that of *Sage v. City of Brooklyn*, 89 N. Y., 189. But there were several clauses in the statute involved in that case, upon which the court relied and rested its decision, that are wholly wanting in the Montgomery avenue case. 'Thus,' says the chief justice, who delivered the opinion of the *majority* of the court, 'by the third section it is declared that the lands "*shall be deemed to have been taken by the city of Brooklyn for public use.*"' *Id.*, 197. 'That the improvement of Sackett street was regarded *by the legislature of the state as a city and not a state improvement, also plainly appears from the supplementary act, chapter 592, Laws 1873.*' The park commissioners were, by that act, authorized and directed to improve Sackett street by grading, paving, planting shade-trees, constructing carriageways, etc., and *by the fourth section the city was required to issue its bonds* for the purpose of raising money to pay the expenses of the improvement, and the money collected on assessments was directed to be paid to the commissioners of the sinking fund *for the redemption of the bonds.*' *Id.*, 198. Thus, by the express terms of the statute, the land was '*deemed to be taken by the city,*' and the *city was expressly made primarily liable, and required to issue its own bonds*, and reimburse itself from assessments on the property benefited. There is nothing of this kind in the Montgomery avenue act, and nothing even looking in that direction. So, also, referring to section 16 of another act as applicable, the chief justice says: 'The direction in section 16, that the comptroller shall pay the land damages,

is absolute and unqualified. It is not a direction to pay them out of the assessments when collected, or out of any particular fund.' *Id.*, 199. Again: 'The city, under that statute [Supplemental Act 1873], was required, primarily, to advance the necessary funds. The provision in the act of 1873 furnishes a strong inference in favor of the claim that the legislature, by incorporating section 16 of the charter into the act of 1868, intended to impose upon the city the duty, either primary or ultimate, of paying land-owners.' *Id.*, 200. On these and other similar provisions the decision was rested. Yet, in the face of these strong provisions of the statutes, showing that the acts in question were intended to be municipal and not state acts, and expressly imposing the liability on the city, those two able judges, of long service and ripe experience, EARL and RAPALLO, dissented, in a clear and cogent opinion, and held the work to be a state and not a municipal work, for which the corporation was not liable," etc.

In the *Sage* case, therefore, it appears that *the City was required to issue its bonds to raise money to pay the expenses of the improvement*. The City was made primarily liable by the issue of its bonds, and merely reimbursed itself by the collection of the assessments on the property benefited. In the present case, Long Island City did not issue any bonds, nor was it made primarily liable for the cost of the work. An examination of the statute will show that Long Island City, as such, was never mentioned, and that no duty of any nature was imposed upon it.

(2) Instead of

Astoria Heights Land Co. v. City of New York,
89 App. Div., 512; affd. 179 N. Y., 579,

cited at pages 115 and 155, being an authority in favor of the complainant, it directly sustains the contention of

defendant. It is one of the principal authorities on which we rely. The complaint, in that action, was dismissed. The statute, which was before the Court for consideration, was chapter 514 of the Laws of 1890, which, to a marked degree, is similar to chapter 326 of the Laws of 1874, which is involved in the present controversy. After an analysis of the Act of 1890, the Court held that no liability was imposed on Long Island City, by any act of the commissioners, because the work was not instituted by the City, nor did the City have any control over it, nor over the Commissioners who were appointed by the statute. The work was not done at the expense of the City, nor were the improvement certificates obligations of the City. Moneys received in payment of the assessment did not become moneys usable by the City for city purposes, but constituted a special fund, applicable to a single purpose. No power was granted to the City and no duty was laid upon it, and therefore the City could not be made liable for neglect or non-performance.

(3) It is asserted that

Koelesch v. City of New York, 34 App. Div., 98,

"is very much in point" (Brief, p. 166). In making that statement, complainant ignores or fails to appreciate the fundamental distinction which exists between that case, and all the other authorities which he cites, and the one at bar. In the *Koelesch* case, the Common Council of Long Island City, acting with the Mayor, was authorized to issue bonds on the requisition of the Improvement Commission. *Those bonds were the bonds of Long Island City, and the money received for them was to be used for the payment of warrants issued by the*

Commission. Discussing this point, Justice WOODWARD (at p. 101) observes:

"The act further provides for assessments against benefited property for some parts of the improvements, but *the intent of the act is clearly that the municipality shall provide for the immediate payment of all the expenses by the issue of such bonds as shall become necessary*, without waiting for the collection of the special assessments."

The decision, in that case, was, therefore, that the City was liable for the non-payment of the warrants because it had failed to issue a sufficient number of bonds, as the Court held was its duty, to pay for them.

(4) An extended reference to

Genet v. City of Brooklyn, 94 N. Y., 645,

cited on page 118, is unnecessary for the reason that that case construes the same statute which was before the Court in *Sage v. City of Brooklyn* (*ante*, p. 76), which we have already considered.

(5)

Beard v. City of Brooklyn, 31 Barb., 142,

cited on page 119, another case "much in point," was an action on the case for negligence, the failure of duty being the omission, on the part of the defendant, to enforce the payment of an assessment which had been levied by the City to defray the cost of executing the contract in suit. It was held that such an action would lie. This case is not an authority in favor of the complainant, because, if, as in that case, the complainant claims to have been damaged by reason of the negligence of the defendant, he, like Beard, had a cause of action for negligence against Long Island City. And if he had, necessarily, he is not entitled to equitable relief.

(6) In

Davidson v. Village of White Plains, 197 N. Y., 266,

cited on page 121, which is somewhat similar in its facts to *Fleming v. Village of Suspension Bridge* (*post*), it appears that the Water Commissioners of the village filed with the Trustees a statement of the sums of moneys which they required and that, thereupon, it became the duty of the Trustees "to issue bonds of the village." The proceeds of these bonds were to be deposited in the Village treasury, to the credit of the Commissioners, and the Clerk of the Village, upon the receipt of a requisition from the Commissioners, was required to prepare and sign a draft for any account or bill which was presented and certified by the president and secretary of the Commission, as audited by it, which draft it was made the duty of the President of the Village to sign "in the same manner as drafts of the Village are signed."

It was held, although it was the duty of the plaintiff, in the first instance, to apply to the Commissioners to audit and certify his claim, that, upon their refusal to comply with his demand, he was not restricted to proceedings against the Commissioners by mandamus.

(7) In

Fleming v. Village of Suspension Bridge, 92 N. Y., 368,

cited on page 120, the Trustees of the Village were permitted to organize themselves voluntarily into a Board of Water Commissioners. These Commissioners had the power

"to borrow from time to time, *upon the credit of the Village*, a sum not exceeding ten per cent. of the as-

sessed value of the real and personal estate of the Village as shall appear by the last assessment roll, upon such term of credit, not exceeding thirty years, as shall seem to them for the *best interests of the Village*; and that to secure the payment of the money thus borrowed they may *execute bonds, certificates or other obligations, to be signed by them, which shall be a valid liability against the Village, and the credit of the Village is pledged for the payment of the same.*"

The Court said (at page 372): "The rents received for the use of the water belong to it (the village), and the entire expense of constructing the water works is a charge upon it."

It is clear that this case has nothing to do with the present question. The Village of White Plains voluntarily contracted for the water works; it issued its own bonds to pay for it, and all the revenues derived therefrom were to be paid to it.

(b) Quite a labored argument is made, under Point IV, page 128, to demonstrate that the word "*then*," in section 5 of chapter 326 of the Laws of 1874, refers to statutes which were in existence at that time, *i. e.*, in 1874; but it is apparent from the context that the lawmakers had no such idea in mind. They were referring to the future; they had in mind the time, ten years thereafter, when the assessments became due; and they meant that time, *i. e.*, 1886, or when the lands would be sold to satisfy the assessments. This question has already been discussed (*ante*, pp. 34).

It is apparent, from even a cursory reading of the statute which was before the Court, in

Ramish v. Hartwell, 126 Cal., 443, 58 Pac., 920, cited on page 131, that that case is not in point.

(c) On page 137, complainant advises us that

"(a) The Act of 1886, chapter 656, is susceptible of a construction consistent with the clear requirements of the act of 1874."

If this be so, what is the use of wasting time and paper in discussing its constitutionality? But we do not agree with the construction which the complainant seeks to give to that statute. Section 4 (*ante*, p. 6) provides that the treasurer shall sell the properties "for the lowest term of years for which any purchaser will take the same and pay the aggregate amount due thereon, and if no person shall so offer to purchase such property for a term of years," it shall be sold "in fee simple to the highest bidder."

The same section also provided that

"Said treasurer shall bid in the name of the city and for the use of the proper fund or account all parcels of real estate at such sale and to be unsold for unpaid taxes, assessments, water rates and rents which shall not be sold to any other person."

What is to become of the properties which are bid in by the City? Is there any obligation on the part of the City to sell them at any particular time? No. Is there any duty on the part of the City to sell them for any particular price? Again, no. Section 9 of the Act, to which the complainant refers (*ante*, p. 7) provides that

*"The common council of said city may at any time by resolution direct a sale of any lot or lots acquired by said city under the provisions of this act, at a price not less than that fixed by them in said resolution, and said treasurer shall * * * sell the same on the day of sale, * * * to the highest bidder, but at not less than the price fixed by the com-*

mon council. When said city shall have so sold any lands under direction of the common council, all liens of said city thereupon for taxes, assessments, water rates or rents, for which the same shall have been sold, shall thereupon be cancelled of record by the said treasurer."

Assuming, but not conceding, that section 9 is applicable, how does that help the complainant's contention? If no bid were made for a certain parcel of property, which had been assessed for the improvement, under the Act of 1874, and if it were knocked down to the City, under section 4 of chapter 656 of the Laws of 1886, what obligation existed, on the part of the City, when that property was again sold, to resell it at a price which would at least equal the amount of the assessment? Absolutely none. The price, at which that property was to be sold, was to be fixed by the Common Council, and that body, unless it were also branded with the complainant's "*express trust*," was at perfect liberty to fix it at any sum it saw fit.

(d) On page 144, complainant seems to derive some satisfaction from what he calls Justice CULLEN'S "first opinion" in the *Nelson* case (pp. 142-143). We are glad that he does. That opinion sustains several propositions for which we contend:

(1) That, under the Act of 1874, the assessments might be paid off and discharged by the improvement certificates;

(2) That *People v. Bleckwenn* (126 N. Y., 310) decided that the owner might use the certificates to redeem his land from the sale; and

(3) That "the reservation in the original act that the sale should be made under laws *that thereafter might be in force*, related solely to the manner of sale, etc."

(e) Notwithstanding his great hullabaloo in regard to Bleckewenn receiving certificates in payment of assessments, complainant admitted, in the Court below (Brief, p. 80), that "**up to 1892, when the first sales, for less than the amount of the assessment were made, the certificate holders had no practical grievance.**"

(f) Referring to

Astoria Heights Land Co. v. City of York, 89 App. Div., 512; affd. 179 N. Y., 579,

on page 156 of his brief, complainant makes some observation which we must confess our inability to appreciate. To our way of thinking, so long as the Legislature creates an independent public board, in the nature of an improvement commission, it makes no difference, from a legal point of view, so far as the question of the liability of the municipality for the acts of that commission is concerned, whether that board is a *general* improvement commission or what the complainant designates as "*a special commission.*" That, as we have pointed out, is not one of the tests of municipal liability, nor has it anything to do with the matter.

XVI.

In answer to Point VI, that the Act of 1886, if construed so as to permit assessment sales in a manner inconsistent with the Act of 1874, is unconstitutional.

Brief, page 165.

This is simply begging the question. The Act of 1874 does not prescribe any method of conducting sales. It provides that the law, which will be in force when the sales take place, i. e., at least ten years later than the passage of the Act of 1874, shall govern (see *ante*, pp. 34, 82). There is no necessity, therefore, of considering the cases cited by the complainant under this heading.

XVII.

Assuming that the Bill of Complaint sets forth facts sufficient to constitute a cause of action, a proposition which we deny, it is barred by the Statute of Limitations.

25 Cyc., 1149-1159.

(a) We have sufficiently demonstrated, we think, that no trust relationship existed between the certificates holders and Long Island City. If that be true, and assuming that Long Island City were in any way responsible, it is clear that the complainant's cause of action would have to be based either on the certificates or on

the negligence of the defendant. But he contends that this is not such an action. But the authorities, as we read them, hold to the contrary. This suit, therefore, is barred by the six years statute of limitations.

New York Code of Civil Procedure, sec. 382.

Alsop v. Riker, 155 U. S., at p. 460;

Strough v. Board of Supervisors, 119 N. Y., 212, 220.

Brown v. Brown, 83 Hun, 160; affd. 146 N. Y., 385.

(b) But assuming that the six year statute does not govern, the ten years statute of limitations surely applies.

New York Code of Civil Procedure, sec. 388;

Rhinelander v. Farmers Loan and T. Co., 172 N. Y., 519, 536;

Hofferberth v. Nash, 191 N. Y., 446;

Matter of Smith, 66 App. Div., 340; affd., 179 N. Y., 563;

Dugan v. Sharkey, 89 App. Div., 161;

This Court has so ruled.

Clarke v. Boorman's Executors, 18 Wall., 493, 505.

See, also,

Cleveland Insurance Co. v. Reed, 24 How., 284.

(c) The rule, that the statute of limitations does not ordinarily run against *express* trusts, is not applicable to trusts created by implication or operation of law. Thus, when a suit in equity is brought to force upon defendant the character of a trustee of a constructive

trust, the Court will ordinarily, by analogy, apply the same statute of limitations which governs actions at law.

To quote the language of Mr. Justice NELSON, in

Beaubien v. Beaubien, 23 How., 190, 207,

"The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law, in applying the statute of limitations (*Kane v. Bloodgood*, 7 John. Ch. R., 91; *Hovenden v. Annesly*, 2 Sch. and Lif., 607)."

See, also,

King v. Pardee, 96 U. S., 90;

Spencer v. Henrici, 120 U. S., 377;

Riddle v. Whitehill, 135 U. S., 621.

And it has been stated that "the reason for the distinction, between the effect of the statute upon *express* and *implied* trusts, lies in the fact that, in the latter kind of trust, the element of trust and confidence is absent"; and that, in the latter instance,

"the relation of trustee and *cestui que trust* does not, in fact, exist, and the holding of an implied or constructive trustee is for himself, and therefore, at all times, adverse."

Hughes v. Brown, 88 Tenn., 518, 8. L. R. A., 480.

(d) In determining, therefore, what trusts are exempt from the statute of limitations, the term "trust" is not to be given its general or popular meaning. The word

must be construed according to its technical significance so as not to include anything but active trusts.

Mills v. Mills, 115 N. Y., 80, 86;
Brown v. Brown, 83 Hun, 160; affd. 146 N. Y., 385.

(e) Money which has been paid to a public officer to be held, paid over, or invested, according to law, is not held in trust within the rule exempting *express* trusts from the operation of the statute of limitations.

Strough v. Board of Supervisors, 119 N. Y., 212;
Robinson v. City of Brooklyn, 9 N. Y. St. Rep., 716;
Merrill v. Town of Monticello, 66 Fed., 165; affd. 72 Fed., 462;
Dearborn County v. Lords, 9 Ind. App., 369, 36 N. E., 772;
Newsom v. Bartholomew County, 103 Ind., 526, 3 N. E., 163;
Churchman v. Indianapolis, 110 Ind., 259, 11 N. E., 301;
Jasper Dist. Tp. v. Whentland Dist. Tp., 162 Iowa, 62, 17 N. W., 205;
Stillwater, etc., R. Co. v. Stillwater, 66 Minn., 176, 68 N. W., 836.

(f) As indicated, the rule, as to when the statute of limitations begins to run, differs in the case of voluntary and of involuntary trustees. If a voluntary trustee does not repudiate the trust, the statute remains inoperative until the trust is breached. *But it is generally held that*

no repudiation of an implied or constructive trust is necessary to set the statute in operation.

Norton v. Bassett, 154 Cal., 411, 129 Am. St. R., 162.

In such cases, the rule is that the statute runs from the time when the act is done by which the party becomes chargeable as trustee by implication or, as it is sometimes expressed, from the time when the *cestui que trust* could have enforced his right by suit.

Shelby v. Shelby, Cooke (Tenn.), 179, 5 Am. Dec., 686;

Newman v. Newman, 60 W. Va., 371, 7 L. R. A. (N. S.), 370.

Or, as it is otherwise stated, the statute begins to run, in favor of the party sought to be made chargeable as trustee, when the wrong is done,

Lorimer v. Stoddard, 103 N. Y., 672;

or the time the beneficiary can assert his rights,

Brown v. Brown, 83 Hun, 160; affd. 146 N. Y., 385;

and not from the time the trust is repudiated by the alleged trustee, *for no repudiation of an implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion.*

Nouques v. Newlands, 118 Cal., 102, 50 Pac., 386;

Broder v. Conklin, 121 Cal., 282, 53 Pac., 699;

Barker v. Hurley, 132 Cal., 21, 63 Pac. 1071;

Oaks v. West (Tex. Civ. App.), 64 S. W., 1033;

Howell v. Howell, 15 Wis., 55.

Complainant (Brief, p. 42) very recklessly asserts that

"The defendant did not, and cannot, submit authorities that inaction by a *cestui* for a period of *ten years*, even in the case of a repudiation of all trust duties by the trustee, is a bar to his claim against the trustee."

If he were a little more industrious, he would have found quite a number. Some of them are,

Curtis v. Laken, 94 Fed., 251 (2 years);

Twin-Lick Oil Co. v. Marbury, 91 U. S., 587, 592 (4 years);

Hayward v. National Bank, 96 U. S., 611 (4 years);

Fraker v. Houck, 36 Fed., 403 (7 years);

Rugan v. Sabin, 53 Fed., 415 (7 years);

Whitney v. Fox, 166 U. S., 637 (8 years);

Patterson v. Hewitt, 195 U. S., 309 (8 years);

Kennedy v. Winn, 80 Ala., 165 (9 years);

Naddo v. Bardon, 51 Fed., 493 (10 years);

Richardson v. McConaughey, 55 W. Va., 546, 47 S. E., 287 (10 years).

Other cases holding that delays of twenty years and less are fatal are,

- Marsh v. Whitmore*, 1 Hask., 391, F. C. 9, 122 (11 years);
Etting v. Marx, 4 Fed., 673 (12 years);
Wells v. Perry, 62 Mo., 573 (12 years);
Gaither v. Gaither, 3 Md. Ch., 158 (14 years);
Bruner v. Hurley, 187 Pa. St., 389, 41 Atl., 334 (15 years);
Groome v. Belt, 171 Pa., 74, 32 Atl., 1132 (17 years);
Hammond v. Hopkins, 143 U. S., 244 (19 years);
Kahn v. Chapin, 152 N. Y., 305 (20 years).

Apparently, complainant does not dispute these propositions. His contentions appear to be:

- (1) that, as between the trustee of an *express* trust and the beneficiary, the statute of limitations does not begin to run until the trustee, with the knowledge of the beneficiary, repudiates the trust;
- (2) that all of the trust duties imposed upon Long Island City by the statute were not repudiated; and
- (3) that, on the assumption that the statute of limitation does not apply, it has been waived or, as the complainant expresses it, been tolled.

We have demonstrated, successfully, we think, that, under the Act of 1874, Long Island City was not the trustee of an *express* trust. The cases cited by the complainant, therefore, are not in point. But assuming that they do apply, they are clearly distinguishable. The sales of the properties, for the non-payment of the assessments,

on which the complainant's suit is based, took place in 1892 and 1893. The present suit was not commenced until July 26, 1910. A period of seventeen years, therefore, elapsed between the time when the cause of action accrued and the date when this suit was started. Complainant, however, contends that this period of seventeen years does not bar his cause of action, because he is suing as the *cestui que* of an *express trust*. As authority for his claim, he cites two cases. The first is

New Orleans v. Warner, 175 U. S., 120,

where it appears, at the foot of page 126, that the decree appealed from declared

"that such assessments, including those against the city, as the owner of its streets and squares, constituted a trust fund in the hands of the city for the purpose of paying complainant and other holders of the same class of warrants and that the case be referred to a master to state an account."

Furthermore, it appears that there were still in existence against the City itself, assessments amounting to \$696,349.98, which were applicable to the payment of the warrants. On such a state of facts, there can be no question but that the statute of limitations did not apply. As long as a trust fund is held by a trustee of an *express trust*, whose possession is not adverse to that of the *cestui que trust*, the general rule is that the statute of limitations does not apply. The quotation from the opinion of Mr. Justice BROWN, on pages 103-104 of the complainant's brief, clearly shows that it was on this ground, and on this ground alone, that the Court decided that case. In

Matter of Carpenter, 131 N. Y., 86,

it appeared that the administrator of the deceased trustee of an *express* trust still held the trust property. And, on that ground, it was decided that the petitioner was entitled to a decree that the property held by the administrator was trust property. That case is no authority for the present contention.

In the case at bar, the assessed properties were sold in 1892 and 1893. After the latter date, there was no property of any kind in the hands of the Treasurer of Long Island City. The trust, if one ever existed, then ceased.

It is alleged that these sales of 1892 and 1893 constituted breaches of the trust. If so, the complainant had notice of them, because his agent, Mr. Wanninger, was present at the sales and protested to the Treasurer of Long Island City. It is clear that, on this date, there was a breach of the alleged trust relationship and that the complainant knew of it. From that date, therefore, the statute of limitations began to run. We quote from

28 Am. & Eng. Ency. of Law, 1134:

"Statute applies after trust terminates.—But when the trust relation is terminated in any way, as by the open repudiation and disavowal of the trustee, or by some default on his part, or by vesting of the legal title in the cestui, or in some other way, and such termination is known to the beneficiary, then, and not till then, the possession of the trustee becomes adverse and the statute begins to run in his favor."

See, also,

25 Cyc., 1149;
39 Cyc., 600-603.

This must be the law. Upon any other theory, the complainant could wait an indefinite time before bringing

his suit. And, during all that time, interest, at 7 per cent., would be accumulating on the improvement certificates.

Appellant argues (Brief, p. 59), that "*There was no repudiation.*" If not, of what is he now complaining? But the idea strikes us, with due respect, as being supremely ridiculous. A repudiation of a trust is something which is done by the trustee in open contravention of the terms of the trust.

Marshall's Estate, 138 Pa. St., 285, 22 Atl., 24.

It must be of such a character that the relations of the parties become and continue hostile.

New Orleans v. Warner, 175 U. S., 120, 130.

"A use of a trust fund by the trustee for his own benefit, or in any way inconsistent with the trust, and conclusively evincing a repudiation," is sufficient.

Buttles v. De Baun, 116 Wis., 323, 93 N. W., 5.

Under chapter 326 of the Laws of 1874 (*post*, p. 109), the certificates were to be paid off at the expiration of ten years from the filing of the assessment rolls. That statute provides that

"§11. Upon the completion of the sales for the non-payment of the assessments levied, as hereinabove provided, of the lots and parcels of land in said improvement district, *after the expiration of ten years from the filing of the assessment rolls, all the certificates issued by the said commissioners shall be paid off*, and if there be any excess to the credit of said improvement fund in the hands of the treasurer, it shall be paid into the city treasury, in payment of city taxes upon the property, assessed hereunder, within said improvement district, in proportion to the amount assessed upon each lot or parcel

of land respectively, and the owner of each lot or parcel of land shall have credit therefor upon such taxes."

It was the duty of the Treasurer of Long Island City, under this section, to sell the properties after the expiration of ten years from the filing of the assessment rolls. And if he failed to do so, or in case he sold them improperly, the complainant then had a cause of action against him. Such an action would be necessarily governed by some statute of limitations, and would not come within the doctrine of a continuing *express* trust. The Treasurer's duty to collect the assessments was not indefinite as to time; he was bound to perform it at the end of ten years. In case he failed to obey the statute, a cause of action then accrued. After that, at the end of the statutory period of limitations, the complainant's cause of action was barred. A case directly in point is

Eddy v. City and County of San Francisco, 162 Fed., 441.

And it has been held that the failure to provide a special fund, out of which certificates might be paid, does not prevent the running of the statute of limitations where the alleged trustee does not recognize the validity of the certificates or his obligation to create and maintain a fund.

Howe v. Town of Gunnison, 42 Col., 540, 15 L. R. A. (N. S.), 1276.

XVIII.

Apart from the consideration that this suit is barred by the statute of limitations, we maintain that the complainant was guilty of such gross laches, and that those laches were so prejudicial to the present defendant, that a Court of Equity ought not to afford the complainant any relief.

(a) Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a state trust, except where,

1. The trust is *clearly established*.

2. The facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.

Badger v. Badger, 69 U. S. (2 Wall.), 87;
Godden v. Kummell, 99 U. S., 201;
Speidel v. Henrici, 120 U. S., 377;
Riddle v. Whitehill, 135 U. S., 621;
Alsop v. Riker, 155 U. S., 448.

Complainant contends that he was not guilty of laches because from 1893 on, as appears from the testimony of Mr. Benner (pp. 51-54), "various negotiations were had more or less continually looking to some arrangement for the relief of certificate holders, including plaintiff's injunction of June, 1893 (Tr. Rec., p. 115) and particularly in 1904, an Act of the Legislature was passed, chapter 686 (drafted a year or two before with the approval of the City of New York itself, p. 51, and the co-operation of

Mr. Benner, complainant's then attorney), authorizing the City to compromise and settle claims based on these certificates and to purchase the same and to issue revenue bonds of the City therefor, or corporate stock; and this Act (as it appears therefrom) was 'accepted by the City.' ”

Complainant's Brief, p. 34.

We have quoted this language in full because it is the only excuse for laches which is even attempted. The sales, of which the complainant complains, took place in 1892 and 1893. In June, 1893, complainant commenced an equity suit against Bleckwenn to restrain him

(a) from receiving certificates from property owners, when redeeming their properties from the assessment sales; and

(b) from marking upon the books, as paid, any assessment where the property was sold for less than the amount of the assessment.

Plaintiff's Exhibit "JJ," pp. 114-115.

What became of that suit does not appear. The presumption is that either it was abandoned or that it abated at the death of Bleckwenn.

From that time, however, down to 1905, nearly twelve years thereafter, the complainant apparently did nothing. Then he filed Exhibit "A" (pp. 92-97) with the Comptroller.

The circumstances that chapter 686 of the Laws of 1904 (*ante*, p. 17) was passed, with the consent of the City, proves nothing. Being a City bill, it could not be passed otherwise (**N. Y. Constitution, Art. XII., sec. 3**). But the fact that it was passed proves conclusively that it was

the idea of the Legislature and of the municipal authorities that, prior to that time, there was no liability on the latter's part and, for that reason, that it was beyond the power of the municipality to compromise or settle or adjust any such claims. In this connection, it is also to be borne in mind that, prior to the commencement of the present suit, there was no suggestion that the defendant, as the successor of Long Island City, was the trustee of the alleged *express* trust which, it is claimed, was created by the Act of 1874. These claims were filed and these alleged negotiations were conducted on the theory that the complainant had a common law action or demand against the City. If that be so, **how can it be urged, with any degree of sincerity, that the complainant's laches, in not sooner commencing an equity suit, are excused by negotiations which were pending to settle a common law demand?** It seems to us that complainant's attitude, in this regard, is somewhat disingenuous.

Now, what is the general doctrine of laches. To quote Judge ANDREWS, in

Calhoun, et al., v. Millard, et al., 121 N. Y., 69, 81:

"It is, and always has been, the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable laches in making his application. (Story, Eq. Juris., §1520.) The principle is stated with great force and clearness by Lord CAMDEN, in *Smith v. Clay* (2 Ambl., 645): 'Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. *Laches* and neglect are discontenanced, and, therefore, from the beginning of this court, there was always a limitation to suits in this court.' "

And it has been said that

"The term 'laches,' in its broad legal sense, as interpreted by courts of equity, signifies such unreasonable delay in the assertion of and attempted securing of equitable rights as should constitute, in equity and good conscience, a bar to recovery. * * * A learned judge has aptly and beautifully said that this power, as exercised by courts of equity, is well symbolized by the emblem of Time, 'who is depicted as carrying a scythe and an hour glass; that, while with one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed.' "

Graff v. Portland Town & Mineral Co., 12 Colo. App., 106, 54 Pac., 854, 856.

Moreover, this Court has repeatedly held that, where, from delay, any conclusion, at which the Court may arrive, must, at best, be conjectural, and the original transactions have become so obscured, by lapse of time, loss of evidence, and death of parties or witnesses, as to render it difficult, if not impossible, to do justice, the plaintiff, by his laches, will be denied relief.

Brown v. Buena Vista County, 95 U. S., 157;
Speidel v. Henrici, 120 U. S., 377;
Mackall v. Casilear, 137 U. S., 556;
Foster v. Mansfield, etc., R. Co., 146 U. S., 88;
Alsop v. Riker, 155 U. S., 448.

That is precisely the present situation. On the hearings before the Special Master, the present defendant was in a very peculiar predicament. Bleckwenn was dead; no witnesses were obtainable; the counsel who represented the City could not ascertain the facts and were, therefore, unfamiliar with them. That is the reason why

they were obliged to refrain from any cross examination. But what is more important than all, the alleged trustee of the *express* trust, Long Island City, had suffered a statutory decapitation; it had ceased to exist. Under these circumstances, we most earnestly insist that this most salutary equitable doctrine applies.

It is argued, however, that laches, in legal significance, is not mere delay, but delay which works a disadvantage to another. That is partially, but not strictly accurate. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. When a Court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief.

Penn. Mut. Life Ins. Co. v. Austin, 168 U. S., 685.

And it has likewise been held that the mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded.

Mackall v. Casilear, 137 U. S., 556;

Gildersleeve v. New Mexico Min. Co., 161 U. S., 573;

Whitney v. Fox, 166 U. S., 648;

Penn Mut. Life Ins. Co. v. Austin, 168 U. S., 697;

The mere institution of a suit, therefore, does not, of itself, relieve a person from the charge of laches. Be-

cause, if he fail in its diligent prosecution the consequences are the same as though it had never been brought.

Johnston v. Standard Min. Co., 148 U. S., 360;

Willard v. Wood, 164 U. S., 502, 525;

O'Brien v. Wheelock, 184 U. S., 450, 482.

If the present defendant be obliged to account for Bleckwenn's alleged misdeeds, and to pay the value of the outstanding certificates, which, it is asserted, amount to about \$300,000 and interest (Record, p. 97), what recourse has it, who will indemnify it? The burden will fall on the entire community. The City of New York cannot collect it from Long Island City or from Bleckwenn. It may be, if this suit had been brought during the life time of Long Island City, that that municipality would have had some sort of an action over against Bleckwenn. He may have given it a bond on which he might have been held liable. (Laws of 1874, chap. 326, sec. 13, *post*, p. 125.) It is alleged in the bill (para. XVIII, page 20, fol. 37) that neither Bleckwenn nor his sureties were of sufficient pecuniary responsibility to respond to such claims as may be made against him. But what redress has The City of New York, and who is responsible for the present condition of affairs?

Assuming, therefore, that both parties to this suit are more or less, or equally, innocent, who should suffer, upon whom should the burden rest, the responsibility fall? There can be but one answer.

See,

Waller v. Texas & Pac. Ry. Co., 245 U. S., 398.

That this doctrine applies to suits in equity to enforce trusts has been squarely held.

Badger v. Badger, 69 U. S. (2 Wall.), 87;
Twin-Lick Oil Co. v. Marbury, 91 U. S., 587;
Thompson v. Ferry, 180 U. S., 484.

(b) As previously pointed out, the defendant disputes the existence of any trust relationship between Long Island City and the certificate holders.

On the assumption that such a relationship existed, plaintiff concedes that the statute of limitation commences to run from the time of the repudiation of the trust by the trustee with the knowledge of the *cestui*; but he argues that there must be a repudiation of the entire trust and not merely a repudiation of one of the trust duties. What he means by a repudiation of the entire trust, as distinguished from a repudiation of one of the trust duties, so far as this particular case is concerned, we fail to appreciate. **Long Island City, in its life time, never recognized the trust; it must, therefore, have repudiated it in toto.** Bleckwenn, from the beginning, pursuant to the orders of the courts, received certificates in payment of assessments, in redemption of properties which had been sold for assessments, and later, as appears by Exhibit "MM" (p. 74), he notified the public, on the 12th day of January, 1892, that the properties assessed would be sold

"for the lowest term of years for which any purchaser will take the same and pay the aggregate amount due therein, or if no person shall so offer to purchase, then in fee-simple to the highest bidder."

Every trust obligation, which the complainant alleges existed, was broken.

39 Cyc., 603, 604.

If we understand his position correctly, complainant contends that the defendant recognized the trust by receiving, as late as 1907, certificates in redemption of properties which had been sold for assessments. This is one of the breaches of trust of which the complainant complains. How consistent is he! The proposition that a person can recognize a trust by doing that which it forbids, is absurd.

(c) The contention that the ten years' Statute of Limitations only applies to cases exclusively within the jurisdiction of equity and does not control the present situation.

Brief, page 67.

We fail to appreciate what this means. Unless the present suit be *sui generis*, it is either an action at law or a suit in equity. If it be an action at law, it is governed by the six years' statute of limitations; if an equity suit, by the ten years' statute of limitations.

Bliss' New York Annotated Code (5th ed.), vol. 1, sec. 388, and cases cited.

If the equity and common law courts have concurrent jurisdiction, then the common law statute of limitations governs. But some statute of limitations must apply.

(d) As to the proposition that a city treasurer and collector of taxes is peculiarly a city officer and agent of the city.

Brief, page 175.

It may be that, for certain purposes, he may be so considered; that, however, is not the question. The point

is whether the official is acting for, or on behalf of the municipality, and whether the municipality, in the performance of the obligation which is imposed upon it, is performing a private municipal function or a governmental duty. With very few exceptions, the authorities are uniform in holding that collectors of taxes and assessments, while they may be appointed and paid by the local authorities, act as agents of the state and that the municipality is not liable for their acts.

See, *ante*, p. 64.

The case cited by the complainant (Brief, p. 177),

Durkee v. City of Kenosha, 59 Wis., 123, 17 N.W., 677, 48 Am. Rep., 480,

forcibly illustrates the distinction. It was there held that an action was maintainable against the defendant for the seizure and sale of property to pay an illegal assessment for opening a street, for the reason that such acts were in the performance of a municipal function as distinguished from a governmental duty. To repeat, that is the test, whether the officer is acting in the performance of a duty imposed upon the municipality, for its own private gain or to serve its own ends and purposes, or whether the duty which the municipality is performing is an obligation of the State and the municipality is acting as one of the agents of the State, simply and solely because it is one of its political subdivisions.

We fail to appreciate what benefit Long Island City obtained by the imposition and collection of these assessments. In doing what he did, Bleckwenn did not act on behalf of that municipality; he was the agent appointed by the State to represent the certificate holders and, in all he did, he was their representative and not the agent of

Long Island City. Anyone else could just as well have been designated by the State. And simply because the person who was appointed happened to be a municipal officer, does not make the municipality responsible for his wrongful deeds. Let us view the situation from another angle. Complainant contends, because the Treasurer and Collector of Taxes of Long Island City was a municipal officer, that Long Island City is liable for his torts. Let us assume, for the purposes of this discussion, that, instead of the Legislature designating the Treasurer and Collector of Taxes of Long Island City as the officer who was to collect the assessments and sell the properties, it had designated the Comptroller of the City of New York or the Board of Assessors of the City of Buffalo to act in that capacity; would the complainant contend, in the given case, that either the City of New York or the City of Buffalo was the trustee of an *express* trust and liable to account to him because of lack of funds to redeem all of the outstanding certificates? That, if we correctly understand his argument, is the position he seeks to maintain.

(e) As to the contention that the work contemplated by the statute in question was a local work for the benefit peculiarly of Long Island City and its inhabitants.

Brief, page 184.

This contention is successfully answered by the quotation (*ante*, p. 58) from

Taggart v. Fall River, 170 Mass., 325.
City or all of the properties in Long Island City were

There is another consideration to be borne in mind and that is that all of the inhabitants of Long Island

not assessed for this improvement. The assessment was confined to a particular area, a given district, a limited section of the city. Why? For the simple reason that it was the people of that particular section who were deemed to be benefited, and not the people of the city at large.

(f) As to the contention that the opening of new streets, etc., are peculiarly municipal duties.

Brief, page 185.

Citing

Barnes v. District of Columbia (91 U. S., 540),

as his authority, complainant seeks to maintain this doctrine. We do not understand that the *Barnes* case is any authority for the proposition. But if it is, it has been overruled, at least to that extent, by

Atkin v. Kansas, 191 U. S., 207.

It was there held, we quote the head note, that

"The building of a highway whether done by the State directly, or by one of its instrumentalities—a municipality—is work of a public, not private, character," and that "It is within the power of a State, as guardian and trustee for its people and having full control of its affairs, to prescribe the conditions upon which it will permit public work to be done in behalf of itself or its municipalities."

See, also,

Heim v. McCall, 239 U. S., 175, 190.

XIX.

**The appeal should be dismissed or the judgment
should be affirmed.**

Dated, March 22, 1919.

Respectfully submitted,

WILLIAM P. BURR,
Corporation Counsel.

TERENCE FARLEY,
GEORGE P. NICHOLSON,
of Counsel.

APPENDIX.

CHAPTER 326.

AN ACT TO PROVIDE FOR IMPROVEMENTS IN AND ADJOINING THE FIRST WARD OF LONG ISLAND CITY.

Passed May 5, 1874; three-fifths being present.

*The People of the State of New York, represented in
Senate and Assembly, do enact as follows:*

Section 1. The powers, duties and terms of office of the commissioners of streets, roads, avenues and parks in Long Island City, appointed under chapter seven hundred and sixty-five of the laws of the State of New York of eighteen hundred and seventy-one, passed April 26th, one thousand eight hundred and seventy-one, entitled "*An Act to provide for the laying out of streets, avenues, roads and parks in Long Island City, as modified and amended by chapter eight hundred and fifty-nine of the laws of eighteen hundred and seventy-two,*" passed May 25th, eighteen hundred and seventy-two, entitled, "*An Act to amend an act entitled 'An Act to provide for the laying out of streets, avenues, roads and parks in Long Island City,'*" passed April 26th, eighteen hundred and seventy-one, are hereby extended for a period not exceeding five years, for the purpose of improving the streets and avenues in the district in and adjoining the first ward of Long Island City, included within the following boundaries, namely:

Commencing at a point formed by the intersection of the westerly boundary line in said city in the East river with a line drawn parallel with Nott avenue and one hun-

dred feet northerly therefrom; thence easterly along the said line and parallel with Nott avenue as the same runs until said line intersects a line drawn parallel with and distant one hundred feet easterly from the easterly line of Vandam Street; thence southerly parallel with and one hundred feet easterly from Vandam street to the north-easterly line of Borden avenue; thence southerly across and on a line drawn at right angles with Borden avenue to a point distant on said line one hundred feet southerly from the southerly line of Borden avenue; thence westerly along a line parallel with and distant one hundred feet southerly from the southerly line of Borden avenue to a point distant on said line one hundred feet easterly from the easterly line of Van Alst avenue; thence southerly parallel with and one hundred feet easterly from the easterly line of Van Alst avenue to the southerly boundary line of Long Island City to Newtown creek; thence westerly along the southerly boundary line of said city on Newtown creek to the westerly boundary of said city on the East river, and thence northerly along the said westerly boundary of said city to the place of beginning as the several streets and avenues included within the boundaries aforesaid are laid down and designated on the commissioners' map of said city; the said improvement district being substantially bounded on the west by the East river, on the north by a line one hundred feet north of Nott avenue and parallel thereto, on the east by lines one hundred feet east of Vandam street and Van Alst avenue, and drawn parallel thereto respectively, and on the south by Newtown creek and by a line one hundred feet south of Borden avenue and drawn parallel thereto; and Hunters Point avenue, Borden avenue, Jackson avenue and Vernon avenue, within the limits of said improvement district, shall severally be

and are hereby declared to be public streets of Long Island City, and as such shall fall within the provisions of this act.

§2. Said commissioners are hereby authorized, empowered and directed to proceed with all possible dispatch to grade, sewer, pave or macadamize, curb, gutter and flag so much of each street and avenue laid down on the commissioners' map of said Long Island City, as is embraced within the boundaries aforesaid including all streets and parts of streets laid out over any salt marsh, but excluding Tenth street from West avenue to the East river, and also excluding all parts of streets except Front street, laid out over lands now being below low-water mark on the East river and Newtown creek; and also to lay crosswalks at all street intersections within the same limits, and to bridge any water necessary to be bridged, but no grading, sewerering, paving, macadamizing, curbing, guttering, flagging or laying of crosswalks, shall be done on any street or avenue until after the title to that portion thereof so to be improved shall have been acquired by, and vested in, said city for the purposes of a street thereof, but said improvements shall be done on all such streets and avenues and parts of streets and avenues within said district upon such title being acquired thereto respectively.

§3. Said commissioners shall estimate, ascertain and certify to the board of assessors of Long Island City the cost, charges and expenses of the grading, sewerering, paving, macadamizing, curbing, guttering, flagging, bridging and laying of crosswalks, in this act provided for, including pay of surveyors, engineers, inspectors, counsel, clerks and other necessary expenses in and about the making of such improvements, with such certainty and particularity as said commissioners may deem necessary

to enable said assessors to make a fair and equitable assessment of the expenses of making the improvements authorized by this act; and for the purpose of convenience in such certification, the commissioners may subdivide the improvement district into sections or sub-districts in such manner and of such extent as to them may see fit, and in each such certificate to the board of assessors shall relate to one of such sections or sub-districts, and shall certify the estimated expenses of such improvements within such section or sub-district covered by such certificate upon the property to be benefited by such improvements in such manner and form as will enable said assessors to determine the estimated amount and cost of the grading, paving or macadamizing, flagging, curbing, guttering and crosswalks, and also the proper and ratable proportion of the estimated cost of sewers and bridges and of the incidental expenses of such improvements required for or justly chargeable to each lot within such section or sub-district. Every part of the improvement district shall be included in one of said sections or sub-districts, and each section or sub-district so constituting the subject of any certificate shall be accurately bounded and described, and may embrace such streets and avenues, or such portions or sections of any street or avenue as the commissioners may see fit; and if, in the judgment of said board of assessors any such certificate shall not be sufficiently definite or specific, said commissioners shall, on the written request of said board, alter or amend the same from time to time as may be necessary. The estimated cost of such grading, paving, macadamizing, curbing, guttering, and flagging, shall be assessed as nearly as may be upon the several lots in front of which the same shall be done; the estimated cost of crosswalks and of the paving, grading, curbing, guttering and flag-

ging street and avenue intersections not in front of any lot shall be assessed upon the several lots in the adjoining blocks, pro rata, according to the number of lineal feet of street or avenue frontage of such lots respectively; and the proper and equitable proportion of the expense of all sewerage and bridging in the said improvement district, and also the proper and equitable proportion of all the incidental expenses of making the several improvements authorized by this act, shall be assessed upon the several lots, pieces or parcels of land within said improvement district according to the number of lineal feet of street or avenue frontage of such lots, pieces or parcels respectively, and irrespective of buildings thereon, but the area of assessment for the said paving, grading, curbing, guttering and flagging of any street or avenue in said improvement district in front of any lot or parcel of land shall extend to and embrace all the land (exclusive of streets) lying on each side and within one hundred feet of such street or avenue.

§4. Said assessors shall thereupon make up and sign an assessment roll in regard to and upon the property included within each one of said certificates so made by said commissioners in which each lot, piece or parcel of land within such section, or sub-district, exclusive of the streets, avenues and public places, shall be assessed for the payment of its proper and equitable proportion of all the expenses of said improvements and each such lot or parcel of land shall be distinctly described by such lot, ward or block numbers or other designations as may be best adapted to designate the same, together with the name of the owner of each parcel, if such name is known to or can be ascertained by said assessors, and if not known or cannot be ascertained then by the words "unknown owners," but no assessment shall be invalid by

reason of any error or mistake in the owner's name as set down on said assessment roll; said assessor shall thereupon cause a copy of said assessment roll to be made and deposited in the office of said commissioners (which office shall be in the first ward of Long Island City) for public inspection and examination, free of charge to any person assessed during all ordinary business hours for two weeks from the date of such deposit. It shall be the duty of said board of assessors to meet on every business day during the second* of said two weeks at the office of said commissioners to hear, consider and determine upon all objections to said assessments which may be made by the owner or by any person otherwise interested in any parcel of land so assessed, and to correct such assessments if found to be incorrect; and notice of such deposit and of the time and place of the several meetings to hear objections and correct such assessments, shall be given by publication in all the newspapers published in said city and in each issue of said newspapers respectively during the whole of said two weeks. At any of such meetings, every person owning or interested in any piece or parcel of land so assessed, may apply in writing to said assessors to correct said assessments in respect of the piece or parcels of land owned by him, or in which he may be interested; such application shall state the alleged error in the assessment and the facts and circumstances on which the claim for the correction is based, and shall be verified by the oath or affirmation of the applicant. After hearing all objections so made to said assessments within the time aforesaid, said assessors shall correct said assessment roll with all convenient speed, if the same shall require correction, and make a corrected and final assessment roll in the same form as the original roll hereinbefore pre-

*So in original.

scribed. Said corrected and final assessment roll shall be certified by said assessors or a majority of them to be the final and corrected assessment for all improvements provided for by this act, and shall be duly proved or acknowledged by the several assessors, or a majority of them certifying the same, in the same manner and form as conveyances of real estate are required by law to be proved or acknowledged before being recorded, and shall be forthwith filed in the office of the treasurer and receiver of taxes of Long Island City, and from and after the day of the filing of any such assessment roll in said receiver's office, such assessment shall be a lien upon each lot, piece or parcel of land within the section of sub-district covered thereby to the extent of the amount assessed on such lot, piece or parcel, together with interest thereon, at and after the rate of ten per cent. per annum; such interest to commence to run three months after the filing of said assessment roll, and shall run until such assessment, with interest thereon as aforesaid, shall be fully paid. Said assessors shall each be paid three dollars per day for the time they are engaged in making any such assessment rolls, and the amount necessary therefor, not exceeding six hundred dollars in the aggregate for each assessor, for making all the assessment rolls for improvement authorized by this act, shall be included by the commissioners as part of the incidental expenses of said improvement.

§5. No warrant shall be issued or required for the collection of any assessments under this act; nor shall any warrant be issued for any sale of lands for non-payment of such assessments *until ten years after the filing of such assessment roll;* but all lots, pieces or parcels of land on which any assessment under this act shall remain unpaid on and after the day of the expiration of ten years after

the filing of the assessment roll, affecting the section or sub-district in which the lot is located, shall be advertised and sold for the payment of such unpaid assessment; and *such sale or sales shall be made by the receiver of taxes or other officer then charged by law with the duty of selling lands in said city for non-payment of city taxes and the proceedings for such sale, and such sale shall be the same and on the same notice and like terms; and said lots or parcels of land so sold may be redeemed, and in default of such redemption title thereto shall be given and perfected in the same manner, to the same extent and with the same force and effect;* and the costs, fees, charges and expenses of such sale shall be the same as shall then be prescribed by law for the sale of lands in said city for non-payment of city taxes, without further action or legislation on the part of the common council or any other body. Should application in any form be made by any person to any court or officer having jurisdiction thereof, to vacate, set aside or modify any assessment roll or any assessment upon any lot or parcel of land assessed in any such roll, it shall be competent for such court or officer if it shall appear that any error or irregularity affecting any substantial right exists in any such assessment roll, or in any assessment levied therein or thereby, to confirm so much of said assessment roll or assessment as shall not be irregular and make an order specifying any errors or irregularities, and directing the board of assessors of Long Island City to correct such assessment roll or such assessment, as to such errors or irregularities only, or should the whole assessment roll be found irregular, to make and file a new and corrected assessment roll, conforming with the directions of such order, which corrected or new roll, if made, shall be made and filed in the office of said treasurer, as of the day the assessment roll so corrected was originally filed therein,

and thereupon such corrected assessment or assessments shall be a lien upon the several lots, pieces or parcels of land assessed, in the same manner and to the same extent and with the same force and effect as if so made originally. And the acts and certificates of the said commissioners as affecting any assessments may be amended if irregularities be discovered therein, and the amended acts and certificates shall have the same force and effect as their original acts and certificates. And it is declared to be the intention of this act that the fullest power of amendment shall be vested in said commissioners and said assessors so as to promote substantial justice in the matter of said assessment and in enforcing their lien and collection, so that no part of the property benefited by the improvements shall be exempted from paying its fair share of the expenses thereof, but that the whole of the said expenses shall be borne equitably by all.

§6. Any assessment made under the provisions of this act may be paid to the treasurer and receiver of taxes of Long Island City at any time; and payments in sums of not less than twenty dollars may be made at any time on account thereof or of the accrued interest thereon, but all payments on account shall be first applied to the discharge of the accrued interest, and the residue, if any, of such payments shall be credited on account of the principal sum of such assessments respectively. **The improvement certificates hereinafter provided for shall be receivable at all times at par and accrued interest in payment of any assessment under this act, and of the interest accrued thereon.** All moneys received by said treasurer in payment of such assessments or interest shall be placed to the credit of the improvement fund, consisting of the amounts in the hands of the treasurer growing out of payments of said assessments, and interest,

and shall be kept separate and apart from any other moneys in his hands, and no part of said fund shall ever be paid out by him, except for the purpose of such improvement certificates as provided in the seventh section of this act, or as is herein otherwise provided. Suitable books of account shall be kept by said treasurer showing the date and amount of every payment made to him on each lot, for or on account of the sum assessed or of the accrued interest thereon, and whenever the assessment on any lot shall have been paid in full with interest, said treasurer shall enter on the assessment roll opposite to and on the same line with the entry of the assessment so paid the words "paid in full," with the date of such final payment and from and after such entry such lot shall be free and discharged of and from the lien of such assessment.

§7. Whenever the treasurer of said city shall have not less than five thousand dollars in his hands to the credit of said improvement fund he shall give public notice by advertisement for at least one week in all the newspapers published in said city, and in each of such papers, that he will receive sealed proposals for the sale and surrender to him of such improvement certificates. Such notice shall specify the amount of money in his hands applicable to the purchase of such certificates and shall designate the time and place of receiving and publicly opening proposals. Blanks for such proposals shall be furnished by the treasurer on application of any party desiring to bid, on which shall be printed such rules and regulations as he may deem necessary and prescribe for making such biddings and awards. *Such awards shall be made to the lowest bidder or bidders, but no bid for more than par and accrued interest shall be accepted,* and the treasurer shall in all cases reserve the right to reject any and all

bids not deemed for the public interests. All certificates received by him in payment of such assessments or accrued interest thereon or which shall be purchased and surrendered pursuant to the provisions of this section, shall be forthwith effectually and permanently cancelled and defaced, and suitable books and records shall be kept by said treasurer showing the number, amount and accrued interest of each certificate so received and purchased by him, the date of receiving or purchasing the same and the amount paid or allowed therefor, which books and records shall at all reasonable business hours be opened to the inspection of any person holding any of said certificates and of any party assessed under the provisions of this act.

§8. All grading, sewerage, paving, macadamizing, curbing, guttering, flagging, bridging and setting of cross-walks, under this act, shall be done and all materials requisite therefor, shall be furnished by contract or contracts founded on sealed bids or proposals made in compliance with public notice by advertisement for at least ten days, in all the newspapers published in Long Island City, and in two daily newspapers published in the city of New York, and two published in the city of Brooklyn, specifying the time and place for receiving and publicly opening such proposals; and such contract or contracts, when awarded, shall be given to the lowest responsible bidder, giving adequate security satisfactory to said commissioners, but said commissioners shall have power to reject any bids not deemed by them to be for the public interests. Blank forms for such proposals shall be furnished by said commissioners on application of any party desiring to bid, on which shall be printed such rules and regulations as they shall deem necessary and prescribe for the protection of the public interests in the making

and receiving of such proposals and in awarding contracts thereunder. All provisions in regard to sewers and sewerage in this act, are intended to embrace and include the necessary culverts, dirt catchers, receiving basins and all the appurtenances of a proper system of sewerage.

The proposals for grading shall require the use for that purpose of clean materials free from street dirt or any admixture calculated to produce discomfort or disease. All bids for grading shall be required to name separately the price per cubical yard of all filling to be delivered upon Jackson and Van Alst Avenue, and west thereof; of all to be delivered between those avenues and Dutch Kill creek and canal, and of all to be delivered easterly of such creek and canal; and the contract shall be awarded to the bidder the aggregate of whose bid for all the grading shall be determined by the commissioners, or a majority of them, to be the lowest, and who shall give adequate security therefor satisfactory to them. The contract for grading shall require the delivery of at least three hundred thousand yards of filling each year, until completion. Should any contractor for any labor to be done or any materials to be furnished in or about the improvements herein provided for, fail to comply with the provisions of his contract, the commissioners shall have the right, in their option, to declare the contract void, and to advertise anew for carrying out the unfinished part of the contract, and to make a new contract, or new contracts therefor, until all the improvements shall be finished.

All contracts shall contain such terms, conditions, provisions and restrictions as shall seem desirable to the commissioners for the proper security, safety and advantage of the property owners in regard to the work to be done or materials to be furnished thereunder.

And the said commissioners shall have full discretionary power in the interest of the said property owners in the prosecution of the improvements in their dealings with all contractors and in enforcing all their rights against such contractors, to the end that the said improvements shall be carried to completion in the most speedy, advantageous and economical manner.

§9. In order to pay the expenses of the grading, sewer-ing, paving, macadamizing, curbing, guttering, flagging, bridging and crossings, authorized and provided for by this act, together with all other costs, charges and ex-penses necessary and requisite for carrying on the work and completing the several improvements hereinbefore enumerated, said commissioners are hereby authorized, empowered and directed to issue from time to time as the work progresses, and as required by and under the contracts made by them, and for the necessary inci-dental expenditures of the commissioners certificates of indebtedness, which certificates shall be known as the "Improvement certificate in Long Island City." Such certificates shall be paid out at par to contractors for payments falling due to them upon contracts for work done or materials furnished, as provided for herein and the same may be also sold or negotiated at par by said commissioners, to obtain money for the payment of the incidental expenses necessary in and about the matter of their duties herein, and being all expenses incurred by them other than for labor done and materials furnished under written contracts. Such certificates shall be signed by the commissioners or a majority of them, and countersigned by the treasurer of Long Island City on the written requisition of said commissioners or a ma-jority of them, and shall draw and bear interest at and after the rate of seven per cent. per annum from the date

thereof. They shall be receivable at all times, at par and accrued interest in payment of any assessments laid under this act and of the accrued interest thereon and shall be payable with interest as aforesaid in the manner hereinabove provided, out of any moneys which shall come into said treasurer's hands to the credit of said improvement fund. They shall be payable to the party to or for whom they shall be issued or to bearer, and they shall pass by delivery, and shall be in the form to be determined and approved by said commissioners, and it shall appear upon them that they are issued under the provisions of this act. An accurate record shall be kept by said commissioners in a book to be prepared for that purpose, of all certificates issued by them, showing the numbers, dates and amounts of such certificates and to whom and for what purpose issued respectively. And a similar record shall be kept by said treasurer of all certificates countersigned by him. No such certificate shall be valid for any purpose until countersigned by said treasurer; and on receiving any of said certificates in payment of assessments or interest, or by purchase, as hereinbefore provided, said treasurer shall cancel such certificate, and enter in separate columns on such record, opposite to and on the same line with the record of its issue, the date of its reception or purchase, the par value of such certificates, the accrued interest thereon up to that day, the amount of such principal and accrued interest, the rate per cent. of discount, if any, at which such certificate was received or purchased by him, the amount of such discount and the amount paid or allowed for such certificate on its reception or purchase, together with the name of the person or party from whom such certificate was received or purchased, which record shall at all times during reasonable business hours be opened to the inspection

of all holders of such certificates and of all persons assessed under this act.

The said commissioners, in making any contracts for the improvements hereinbefore provided, shall reserve the right to pay the contractor or contractors therefor by delivery of the certificates hereinbefore described.

§10. The said commissioners shall have power to receive in behalf of Long Island City, any grants of title of any streets or avenues, or parts of streets or avenues within the said improvement districts for purposes of public streets, and they shall have all the same functions, rights and powers in regard to any streets, avenues or public places within the improvement district hereinabove described as are now granted to the common council of Long Island City, by virtue of chapter two of title three of chapter four hundred and sixty-one of the laws of New York, of eighteen hundred and seventy-one, entitled, "An act to revise the charter of Long Island City," and shall have power to make application to the county court of Queens county or to the Supreme Court of the State of New York, at a special term thereof to be held in Queens county, for the appointment of commissioners of estimate and assessment to open, widen, straighten or alter any street, avenue or public place, and to forward, carry out and complete all proceedings for such opening, widening, straightening or altering, irrespective of sections one and two of said chapter two of title three of chapter 461 of laws of eighteen hundred and seventy-one, and except in cases requiring the removal of buildings now standing, without necessity for any petition or any proceeding under said two sections.

§11. Upon the completion of the sales for the non-payment of the assessments levied, as hereinabove provided, of the lots and parcels of land in said improvement dis-

trict, after the expiration of ten years from the filing of the assessment rolls, all the certificates issued by the said commissioners shall be paid off, and if there be any excess to the credit of said improvement fund in the hands of the treasurer, it shall be paid into the city treasury, in payment of city taxes upon the property assessed hereunder, within said improvement district, in proportion to the amount assessed upon each lot or parcel of land respectively, and the owner of each lot or parcel of land respectively, and the owner of each lot or parcel of land shall have credit therefor upon such taxes.

§12. The said commissioners shall act as a board of commissioners, and shall keep minutes of all their meetings and proceedings, and the majority of them shall constitute a quorum for transacting business, and the vote or concurrence of such majority shall be necessary for the transaction of any business and the execution of all contracts, certificates, and all other documents or instruments, and they shall make on or before the first Monday of February, in each year, a report to the mayor of Long Island City of their proceeding during the year ending on the 31st day of December previously. The mayor of Long Island City may increase the number of said commissioners to five by the appointment of two other commissioners to be added to their number, provided such two others be residents and owners of real estate within the said district and that one of such additional commissioners shall have a practical knowledge of civil engineering and surveying, and any such additional commissioners shall, in respect of the matters provided for in this act, but not otherwise, have the same powers and duties and be subject to the same provisions and restrictions in all respects as the other commissioners and as if they had been originally designated in the act passed

May 25th, eighteen hundred and seventy-two, entitled "An act to amend an act entitled 'An act to provide for the laying out of streets, avenues, roads and parks in Long Island City,'" passed April 26th, eighteen hundred and seventy-one. Upon the occurrence of any vacancy by the death, resignation or other disability of any of said commissioners the remaining commissioners shall discharge the duties hereby imposed until such vacancy is filled by the mayor of Long Island City. The commissioners and those who shall fill any vacancies or who shall be appointed as hereinbefore provided shall not receive any compensation for the performance of any duties under this act, from the city treasury, but shall be paid out of the said improvement fund, namely, to the two additional commissioners, should such commissioners be appointed one thousand dollars a year, each, to commence from the date of their appointment, and to the three original commissioners, or such as shall be selected to fill vacancies in their number, the same salaries as now received by them, to commence when their salaries as city survey commissioners shall cease; but shall be confined to the receipt of their salaries under the said acts last above referred to during the term of their continuance as survey commissioners under said acts or any act or acts amending or affecting the same.

§13. The treasurer of Long Island City, and his sureties, shall be liable on his official bonds to Long Island City, given after the passage of this act for the faithful discharge of the several duties imposed by this act, and for all moneys which shall come into his hands, under and pursuant to the provisions hereof, and such liability may be enforced in the name of said city for the benefit of whom it may interest or concern, in the same manner and to the same extent and with the same force and effect in

all respects as in the case of any city moneys which may come into his hands, or of any duty devolved by law upon said treasurer.

§14. Said commissioners are hereby empowered to authorize any contractor for grading, sewerering or paving the streets and avenues in said improvement district, to lay rails over and along any street or avenue in the first and second wards of said city, and to run cars thereon, drawn by horses or steam or dummy engines, for the purpose of hauling dirt, sand or other material for such grading, sewerering or paving purposes, for such limited period of time and under such rules, regulations and restrictions as the said commissioners may prescribe.

§15. All grading and sewerering done under the provisions of this act, shall be done in accordance with and conform to the grades and plans for sewerage established or to be established according to law by said commissioners of streets, roads, avenues and parks, and said commissioners may authorize the owner or occupant of any lot or lots to grade, pave, flag, curb and gutter his own front, under their supervision, and upon the completion of such grading, paving, flagging, curbing and guttering, or either of them, to the satisfaction and approval of said commissioners, or their engineer, the person or persons doing the same, shall be credited by the treasurer with such equitable and ratable proportion of the amount assessed upon the several lots in front of which such improvements shall be made as aforesaid, as may be just, and as shall be agreed upon by and between said commissioners and the party assessed, which amount, together with a description of the lots to be so credited shall be certified to said treasurer by said commissioners or a majority of them, and by the party or

parties in interest claiming such credit. Except in so far as it may be necessary or desirable for the contractor or contractors for the transportation of earth or other material, the said commissioners shall commence the said improvements on the westerly part of the said improvement district, and shall, as far as possible first complete the same and lay the assessments therefor upon that portion thereof west of and including Jackson avenue and Van Alst avenue, and next thereafter complete the same and lay the assessments therefor upon the property between those avenues and Dutchkills creek and canal, and shall subsequently complete the same and lay the assessments upon the residue of the improvement district.

§16. All officers upon whom any duty devolves under the provisions of this act shall take the proper constitutional oath of office.

§17. All laws and parts of laws inconsistent with the provisions of this act, or of any of its provisions, are hereby repealed in so far as they relate to affect the same.

§18. This act shall take effect immediately.

Opinion of the Court.

250 U. S.

memorials and offers of compromise to the city authorities, *held* barred by laches, such a cause of action, in New York, being subject, if not to the six-year statute of limitations (Code Civ. Pro., § 382), then to the ten-year statute (*id.*, § 388) governing bills for relief in cases of trust not cognizable by courts of common law. Pp. 325-327.

In case of an express trust, the statute begins to run when the trust is repudiated. *Id.*

Federal courts, in equity, are not bound by state statutes of limitations, but are ordinarily guided by them in determining their action on stale claims. *Id.*

247 Fed. Rep. 758, affirmed.

THE case is stated in the opinion.

Mr. Leon Abbott, with whom *Mr. Charles K. Allen* was on the brief, for appellant.

Mr. Terence Farley, with whom *Mr. William P. Burr* and *Mr. George P. Nicholson* were on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In 1874 commissioners theretofore appointed by special act (Laws N. Y. 1871, c. 765) to improve the streets of Long Island City were directed to improve a particular district. Laws N. Y. 1874, c. 326. The act provided that the cost of the improvement should be assessed upon the land benefited and created a lien upon the land for the assessment and interest; but it declared that no sale for failure to pay the assessment could be made before the expiration of ten years after filing of the assessment roll. The improvement was to be paid for by delivering to the contractors interest-bearing certificates of indebtedness equal, at par, to the expense of the work and materials furnished. These certificates did not provide

for a personal obligation on the part of the city or the district. They were receivable in payment of assessments at par and interest and were payable in cash only out of moneys to be derived from the assessments, which the city treasurer was directed to keep as an Improvement Fund separate from all other funds. The statute further provided that upon the completion of the sales for non-payment of assessments "all the certificates issued by the said commissioners shall be paid off, and if there be any excess to the credit of said improvement fund . . . it shall be paid into the city treasury." By an amendment passed June 11, 1879 (Laws N. Y. 1879, c. 501), it was provided that, under certain circumstances, it was the duty of the officer making sale of land for non-payment of assessment to receive, in payment of the purchase price, certificates at par and interest.

Certificates were issued to the amount of \$1,847,500. A large portion of the assessments levied were left unpaid by the land owners; and it became necessary to sell the properties. Sales for non-payment of assessments were made in 1888. The purchase price was paid in certificates at par and interest up to the amount of the assessments, the interest and the excess, if any, being paid in cash. In 1892 and 1893 sales of land were made at much less than the amounts of the assessment. Here also bidders were permitted to pay the purchase price in certificates at par and interest. Likewise the owners of lots sold were permitted to redeem lots upon paying the amount of the bid and accrued charges by certificates at par and interest. After all the land had been disposed of and the Improvement Fund exhausted there remained and are now outstanding unpaid certificates aggregating about \$300,000.

Prior to June 11, 1879, Benedict acquired certificates to the amount of \$8000 which he has held ever since, and on which the principal and interest are unpaid. In July,

BENEDICT *v.* CITY OF NEW YORK

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 315. Argued April 22, 1919.—Decided June 2, 1919.

A suit against a city to enforce, as upon an express trust, an accounting of an improvement fund and liability for alleged breaches of trust in failing properly to conduct the sales of lands assessed for benefits and properly to apply the proceeds of such sales to the satisfaction of public improvement certificates, said suit not having been instituted until more than 17 years after definite repudiation of the alleged trust duties, and the efforts on behalf of the plaintiff having been meanwhile confined to the obtaining of a restraining order, which was never observed, and to the presentation of divers

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1910, suing on behalf of himself and others similarly situated, he brought this suit in the Circuit (now District) Court of the United States for the Southern District of New York to enforce, as upon an express trust, an accounting of the Improvement Fund and liability for alleged breaches of trust. The contention is that Long Island City became trustee of the lien on the several lots for the benefit of the certificate holders; and the alleged breaches of trust relied upon are in substance that, through its treasurer and in spite of the protest, the city permitted and authorized sales of land for less than the assessment in violation of the Act of 1874; that instead of cancelling certificates received in payment of assessments and of the purchase price at sales, it reissued the same; and that even where sales had been made for less than the amount of the assessments it allowed redemption from sales in certificates at par and interest. The City of New York is made defendant on the ground that in 1898 Long Island City was merged into it by the Greater New York Act and that the consolidated corporation assumed the obligations and liabilities of the constituent municipalities. Laws N. Y. 1897, c. 378.

Protest was made by plaintiff at time of sales against the course pursued by the treasurer, but he justified the action complained of, relying upon the Act of 1874 and c. 501 of the Laws of 1879 and c. 656 of the Laws of 1886. Writs of mandamus had previously been issued compelling him to receive certificates at par and interest even in payment for the redemption of land sold for non-payment of assessments. *People ex rel. Ryan v. Bleckwenn* 8 N. Y. Supp. 638; *People ex rel. Oakley v. Bleckwenn*, 13 N. Y. Supp. 487; *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. 310. But plaintiff contended that, in view of § 23 of Title VI of c. 461 of the Laws of 1871, if the Acts of 1879 and 1886 were construed as authorizing the action of which he complains, they impair, in violation of the

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Federal Constitution, the obligation of contracts previously entered into with certificate holders. The case was fully heard in the District Court on evidence, and several distinct defenses were relied upon. The city insisted, among other things, that the statutory lien did not impose a statutory trust upon it; that the persons who acted were not its agents, but independent officers, agents of the State; that the specific provision of the statute relied upon by plaintiff did not constitute terms of the contract but related merely to the remedy; and that the later legislation introduced, at most, permissible changes of remedy. The court, without passing upon these questions, entered a decree dismissing the bill on the ground that the statute of limitations and laches constituted a complete defense. 235 Fed. Rep. 258. This decree was affirmed by the Circuit Court of Appeals on the same grounds. 247 Fed. Rep. 758. Benedict is a citizen of Connecticut; but as he invoked the jurisdiction of the Circuit Court not only on the ground of diversity of citizenship but also because of rights asserted under the Federal Constitution, his further appeal to this court was permissible. *Vicksburg v. Henson*, 231 U. S. 259, 267-268.

The whole case is here for review; but we find it unnecessary to decide most of the questions presented; because we are of opinion that the lower courts did not err in holding that the suit was barred by laches. None of the acts relied upon here as constituting breaches of trust occurred later than the years 1892 and 1893. Before the principal action complained of was taken, the city treasurer publicly announced his purpose to pursue the course complained of, which he asserted was in accordance with law. Plaintiff was represented at the sales by an agent who protested there orally and elsewhere in writing against the treasurer's declared purpose and against specific acts now complained of, asserting then

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as now that the course pursued was illegal. We have here a definite repudiation of the alleged trust duties more than 17 years before the institution of this suit. And there are no circumstances which excuse the delay. What occurred in the interval, so far as appears, was this:

(a) In June, 1893, Benedict commenced in the Circuit Court of the United States for the Eastern District of New York a suit in equity to restrain the treasurer from receiving certificates from property owners when redeeming their properties from assessment sales, made to the complainant, and from marking upon the books as paid any assessment upon such property when it was sold for less than the amount of the assessment. It seems that hearing on the motion was adjourned to a later date, and that a restraining order issued which the plaintiff alleges was never observed. It is not shown that any other proceeding was ever taken in the suit.

(b) On May 9, 1904 (at whose instance does not clearly appear), the legislature enacted a statute (Laws N. Y. 1904, c. 686) entitled "an Act to authorize the comptroller and corporation counsel of the city of New York on behalf of said city to compromise and settle with property owners interested, certain claims for taxes, assessments and sales for the same, and for or on account of evidences of indebtedness issued on account of local improvements in the territory formerly included within the boundaries of Long Island City."

(c) On February 21, 1905, plaintiff filed with the comptroller of the City of New York an offer to sell to the city by way of compromise certificates held.

(d) On May 26, 1909, plaintiff's present counsel, acting on behalf of the holders of two hundred and eighty-three certificates, presented to the comptroller a memorial and statement of facts, in which he requested "that provision should be made in some way for the payment of the amount due" on the certificates.

(e) Under date of March 19, 1910, plaintiff presented to the comptroller a similar memorial which he requested should be submitted for determination to the board of estimate and apportionment, in view of the fact that chapter 601 of the Laws of New York of 1907 provided that the comptroller may do so where he believes that, for any reason, a claim against the city is not valid legally, but in equity, justice, and fairness the same should be paid, the city having been benefited by the acts performed and the claim not being barred by the statute of limitations.

(f) On April 26, 1910, a formal request was made upon the deputy comptroller.

Under the law of New York the alleged cause of action would have been subject, if not to the six year statute of limitations, (New York Code of Civil Procedure, § 382), then to the ten year statute of limitations, (New York Code of Civil Procedure, § 388), governing bills for relief in case of the existence of a trust not cognizable by the courts of common law. *Clarke v. Boorman's Executors*, 18 Wall. 493. If the Act of 1874 created an express trust, the statute of limitations would not begin to run until there had been a repudiation of the trust. *New Orleans v. Warner*, 175 U. S. 120, 130. Here there was an open repudiation of the trust duties which the plaintiff now seeks to enforce. And 17 years were allowed to elapse after that repudiation before this suit was begun and more than ten years before any attempt was made to secure some settlement by negotiation; and there clearly was no waiver of the statute. While it is true that federal courts sitting in equity are not bound by state statutes of limitations (*Kirby v. Lake Shore & Michigan Southern Railroad*, 120 U. S. 130), they are, under ordinary circumstances, guided by them in determining their action on stale claims. *Godden v. Kimmell*, 99 U. S. 201, 210; *Philippi v. Philippe*, 115 U. S. 151; *Pearsall v. Smith*, 149

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U. S. 231; *Alsop v. Riker*, 155 U. S. 448. Compare *Sullivan v. Portland & Kennebec R. R. Co.*, 94 U. S. 806, 811. Between 1892 and 1905 plaintiff did nothing to enforce his alleged rights except to commence in 1893 a suit which he did not prosecute. His lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. The lower courts did not err in sustaining the defense of laches.

Decree affirmed.
